TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 96

JOHN M. KOSSICK, PETITIONER,

vs.

UNITED FRUIT COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1960
CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., SEPTEMBER 21, 1960

[fol. A]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN M. KOSSICK,

Plaintiff-Appellant,

against

UNITED FRUIT COMPANY,

Defendant-Respondent.

On Appeal From the United States District Court
for the Southern District of New York

Appendix for Plaintiff-Appellant

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN M. KOSSICK, Plaintiff-Appellant,

against

UNITED FRUIT COMPANY, Defendant-Respondent.

STATEMENT UNDER RULE 15(b)

This action was commenced by the filing of a complaint on July 20, 1954.

An amended complaint was thereafter filed on June 6, 1958.

Issue was joined by the service of an answer to the amended complaint on June 12, 1958.

The defendant thereafter moved for an order dismissing the first cause of action of the amended complaint, which motion was granted by Hon. Alexander Bicks on September 10, 1958. The second cause of action was discontinued without costs and without prejudice on November 20, 1958.

A judgment was thereafter entered on March 31, 1959, dismissing the complaint. A notice of appeal was duly filed by the plaintiff from that judgment on April 16, 1959.

There has been no change in the plaintiff or his attorney since the commencement of this action.

The attorney for the defendant at the commencement of this action was Thomas H. Walker, Esq.

At present the attorneys for the defendant are Burlingham, Hupper & Kennedy, Esqs.

[fol. 2]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AMENDED COMPLAINT—Filed June 6, 1958

Plaintiff, for his amended complaint, by his attorney, respectfully states and alleged upon information and belief, as follows:

FOR A FIRST CAUSE OF ACTION:

First: That at all the times hereinafter mentioned, the defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and duly licensed to do business in the State of New York, maintaining a principal place of business within the jurisdiction of this Court.

Second: That at all the times hereinafter mentioned, the plaintiff was a citizen of the United States residing within the State of New York.

Third: That the plaintiff is suing for a sum of money in excess of Three Thousand ($3,000.00) Dollars, and as appears by the foregoing, there is diversity of citizenship between the parties hereto, this Court has jurisdiction of the above entitled matter.

Fourth: That at all the times hereinafter mentioned the plaintiff was in the employ of the defendant in the capacity of a Chief Steward, by reason of which fact the defendant was under an implied contractual duty to pro-
[fol. 3] vide the plaintiff with prompt, adequate and proper medical and surgical treatment and nursing care, as well as the reasonable expenses of hospitalization, maintenance and cure.

Fifth: That the plaintiff suffered injury, ailment and illness while in the employ of the defendant herein, for which conditions the plaintiff was entitled to treatment without expense to him and at the expense of the defendant herein in the event there was no United States Public Health Service Hospital available where such treatment

might be received, that there was and is available without charge, on request of a shipowner, as well as under other circumstances.

Sixth: That after suffering the injury, ailment and illness as aforesaid, the plaintiff engaged the services of Dr. Robert Edward Frick of 445 West 23rd Street, New York, N. Y., to treat said plaintiff for the conditions from which he was suffering.

Seventh: That the plaintiff had made all necessary arrangements for medical and surgical and post-operative care by Dr. Frick for the agreed price of $350.00.

Eighth: Plaintiff duly demanded of the defendant that said defendant provide the necessary medical and surgical care and treatment and make arrangements for future nursing care and treatment.

Ninth: Plaintiff duly informed the defendant that he, the plaintiff, was not satisfied to receive treatment at the United States Public Health Service Hospital, as he, the plaintiff, did not believe that he would receive prompt, adequate and proper treatment at said institution. The plaintiff further informed the defendant that he, the plain-
[fol. 4] tiff, had had several experiences at said hospital and that he, said plaintiff, knew of his own knowledge and by reason of his personal experience that his health would be jeopardized and that he would not receive prompt, adequate and proper treatment and nursing care at said hospital, as said hospital was overcrowded, undermanned and had several people who were not sufficiently trained, nor had the adequate experience to properly take care of the great number of patients attending said hospital. Plaintiff further informed the defendant that he had experienced such lack of concern and interest on the part of the doctors and attendants who had treated the plaintiff in the past, that he was convinced that that hospital was not the place where he, the plaintiff, would receive such medical, surgical and nursing care, that would be of any benefit to him but on the contrary, that his condition might be worsened by his going to said hospital.

Tenth: That sometime before August 28, 1950, the plaintiff, informed the defendant that he had made arrangements with his attending Dr. Frick, aforementioned, for all the necessary treatment and postoperative care for the price of $350.00, which he, the plaintiff, was willing to pay.

Eleventh: The plaintiff requested of the defendant that provision be made for said plaintiff's maintenance and for the necessary expenses of medical and surgical aid and attendance, hospitalization and nursing care, suggesting the services of Dr. Frick aforementioned.

Twelfth: The defendant, although under a legal contractual obligation to provide the plaintiff with the necessary medical and surgical attendance, hospitalization and nursing care which the plaintiff would require, breached its implied contract to do so by an anticipatory breach consisting of its informing the plaintiff that said defendant [fol. 5] would not provide such care and treatment unless the plaintiff discharged his Dr. Frick aforementioned and in place thereof become a patient of the United States Public Health Service Hospital.

Thirteenth: The defendant in addition to breaching its contract aforementioned, agreed that if the plaintiff would discharge Dr. Frick, and would become a patient of the United States Public Health Service Hospital, that the defendant would assume all the responsibility of any improper, inadequate or incompetent treatment of whatever nature the plaintiff received at the hospital, or for the consequences of any lack of due treatment and nursing care and would compensate the plaintiff for any damages or ill effects that he would suffer by reason of his discharging Dr. Frick and in place thereof becoming a patient of the United States Marine Hospital.

Fourteenth: That by reason of the plaintiff being without the means of continuing with the services of Dr. Frick and by reason of the tortious breach of contract of the defendant aforementioned in anticipatorily breaching its legal obligation to provide the treatment aforementioned, the plaintiff was deprived of the services of Dr. Frick and was forced to accept in lieu thereof, the services of the

United States Public Health Service Hospital, Staten Island, New York.

Fifteenth: That in addition to the tortious breach of contract aforementioned, the plaintiff gave up his right to be treated by his own doctor and relying on the agreement of the defendant to compensate the plaintiff for any damage he might suffer by reason of his discharging Dr. Frick and becoming a patient of such United States Public Health Service Hospital.

[fol. 6] Sixteenth: That as a result of the foregoing, the plaintiff did in fact become a patient of the United States Public Health Service Hospital, Staten Island, New York, on the 28th day of August, 1950.

Seventeenth: That following the 28th day of August, 1950 and his admission to the United States Public Health Service Hospital at Staten Island, New York, and on said date, the plaintiff was treated with an injection of iodine compound in concentrated form which destroyed and otherwise damaged various parts of the plaintiff's person, including his colon, anus and gluteal regions, necessitating surgical intervention for such condition. That all these parts of plaintiff's person had been perfectly healthy prior to the administration of the aforesaid dangerous, destructive and improper medication or drug.

Eighteenth: That as a result of said damage to his person, the plaintiff had to undergo multiple operations thereafter, including a colostomy on his left side of his body on the 22nd day of December, 1950, which subsequently became infected and necessitated a second cholostomy on the right side of his body on the 26th day of January, 1951.

Nineteenth: That by reason of the tortious breach of contract of the defendant in refusing to provide the plaintiff with prompt, adequate and proper medical and surgical treatment and nursing care, its breach of its contract to provide adequate maintenance and cure and by reason of defendant's agreement to compensate the plaintiff for any damage he would suffer and by reason of the fact that the plaintiff did suffer damages as a result of his discharging

Dr. Frick and becoming a patient of the United States Public Health Service Hospital, the plaintiff was caused to suffer injuries and disabilities, for which the defendant is liable in damages.

[fol. 7] Twentieth: That by reason of the foregoing, the plaintiff was caused to become totally and permanently disabled, and was incapacitated from attending to his usual duties or vocation, resulting in his suffering a loss of earnings thereby, and plaintiff may be required to incur obligations for medical and surgical aid and attendance and nursing care, and plaintiff was otherwise injured all to his damage in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

FOR A SECOND CAUSE OF ACTION

Twenty-first: Plaintiff repeats and realleges all of the foregoing paragraphs of the amended complaint with the same force and effect as if herein set forth at length, and in addition thereto alleges:

Twenty-second: That it was the duty of the defendant to provide the plaintiff with the expenses of his maintenance and cure.

Twenty-third: That the plaintiff became disabled as aforementioned, but the defendant failed, neglected and refused to supply the plaintiff with the expenses of his maintenance and cure, all to his damage in the sum of Thirty Thousand ($30,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant herein in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars on the first cause of action, and in the sum of Thirty Thousand ($30,000.00) Dollars on the second cause of action, together with the costs and disbursements of this action.

Jacob Rassner, Attorney for Plaintiff, Office and P. O. Address, 15 Park Row, Borough of Manhattan, City and State of New York.

[fol. 8]

#155

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION—September 10, 1958

BICKS, D.J.

Presented on this motion, is the issue whether the first count in the amended complaint states a claim upon which relief can be granted.

Insofar as here material, the allegations thereof are, that: (i) plaintiff was in the employ of the defendant as Chief Steward; (ii) while so employed he "suffered injury, ailment and illness * * * for which conditions * * * [he] was entitled to treatment without expense to him and at the expense of the defendant herein in the event there was no United States Public Health Service Hospital available where such treatment might be received"; that such a Hospital was available; (iii) "after suffering the injury, ailment and illness as aforesaid", plaintiff prior to August 28, 1950 informed the defendant that he had made arrangements to engage the services of a Dr. Frick, a private physician of his own choosing "for all the necessary treatment and postoperative care for the price of $350.00, which he, the plaintiff, was willing to pay"; (iv) plaintiff informed the defendant that by reason of prior experiences at the Marine Hospital he did not believe he would receive prompt, adequate and proper treatment at that institution; (v) defendant would not provide the medical care plaintiff required except via the facilities of the United States Public Health Service Hospital; (vi) defendant "agreed that if the plaintiff would discharge Dr. Frick, and would become [fol. 9] a patient of the United States Public Health Service Hospital, that the defendant would assume all the responsibility of any improper, inadequate or incompetent treatment of whatever nature the plaintiff received at the hospital, or for the consequences of any lack of due treatment and nursing care and would compensate the plaintiff for any damages or ill effects that he would suffer by reason of his

discharging Dr. Frick and in place thereof becoming a patient of the United States Marine Hospital"; (vii) in reliance upon the aforesaid agreement plaintiff gave up his right to be treated by his own doctor and became a patient at the United States Public Health Service Hospital on August 28, 1950; (viii) medication was administered to the plaintiff at the hospital which damaged certain internal organs all of which "had been perfectly healthy prior to the administration of the aforesaid dangerous, destructive and improper medication or drug"; and (ix) plaintiff's damages, alleged to be in the sum of $250,000.00 are "a result of his discharging Dr. Frick and becoming a patient of the United States Public Health Service Hospital".

As appears, the first count is bottomed on contract and not on unseaworthiness or the Jones Act. This is not an oversight but rather a stratagem to resuscitate a claim time barred under the Jones Act. See 45 U. S. C. A. § 56; *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 (1958); *Engel* v. *Davenport*, 271 U. S. 33 (1926); *Sgambati* v. *United States*, 172 F. 2d 297 (2d Cir.), cert. denied, 337 U. S. 938 (1949). The amended complaint also contains a count for maintenance and cure. The sufficiency of that count is not questioned upon the instant application.

The sufficiency of the first count is attacked on two grounds, viz: (1) that the alleged agreement in suit is *nudum pactum* and (2) that it is void and unenforceable under the Statute of Frauds. Jurisdiction here is predi- [fol. 10] cated on diversity of citizenship. We look, therefore, to the New York law to test the validity of defendant's contentions.[1]

In support of its claim that the agreement lacks vitality for absence of consideration, defendant urges that absent benefit to itself, an undertaking which it was under no legal duty to assume is unenforceable. This position is so clearly untenable as not to merit extended discussion. See *Hamer*

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[1] For purposes of the *Erie-Tompkins* rule, sufficiency of consideration [*Pittsburgh Testing Laboratory* v. *Farnsworth & Chambers Co.*, 251 F. 2d 77 (10th Cir. 1958)] and applicability of Statute of Frauds [*Macias* v. *Klein*, 203 F. 2d 205 (3rd Cir.), cert. denied, 346 U. S. 827 (1953)] are "substantive."

v. *Sidway*, 124 N. Y. 538 (1891); *Weiss* v. *Weiss*, 226 App. Div. 801 (2d Dept. 1943); *Restatement of Contracts* §§ 75, 76 (1932). Benefit to the defendant or no, and relative value of a promise and the agreed consideration therefor, are not determinative on this issue. See *Mencher* v. *Weiss*, 306 N. Y. 1 (1953); *Walton Water Co.* v. *Village of Walton*, 238 N. Y. 46 (1924); *Hamer* v. *Sidway, supra; Restatement Contracts* § 81 (1932).

The second ground of attack—that the Statute of Frauds is a valid defense to the enforcement of the agreement—does not lend itself to the same summary disposition. N. Y. Personal Property Law § 31(2) provides:

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;
>
> " • • •
>
> "2. Is a special promise[2] to answer for the debt, default or miscarriage of another person;
>
> " • • • "

[fol. 11] Absent a primary obligation, i.e., a duty on the part of one other than the party proceeded against, for which the said party undertakes to be answerable, the Statute of Frauds cannot be invoked, *Lilyan Realty Corp.* v. *Gottfried Baking Co.*, 49 N. Y. S. 2d 942 (Sup. Ct. 1944); 2 *Williston, Contracts* § 454 (rev. ed. 1936); *Simpson, Suretyship* § 35 (1950). The words "debt, default or miscarriage" as employed in the Statute embrace all types of primary obligations and duties recognized by law, 2 *Corbin, op. cit.* § 347; 2 *Williston, op. cit.* § 453; 37 C. J. S., *Statute of Frauds*, § 13; *Restatement, Contracts* § 180, comment b (1932); *Restatement, Security* § 89, comment b (1945); including liabilities sounding in tort. *Kahn* v. *Naitove*, 171 Misc. 504 (Sup. Ct. 1939); *Gibbs* v. *Holden*, 137 Misc. 480

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[2] A "special promise", within the meaning of the statute, is a promise made in fact as contrasted with a promise implied in law. 2 *Corbin, Contracts* § 347 (1950).

(Sup. Ct. 1930), aff'd mem., 237 App. Div. 862 (3d Dep't 1932); 49 Am. Jur., Statute of Frauds § 66.

Defendant's alleged undertaking, construed in the light most favorable to plaintiff, was to compensate him for all loss and damages that he might sustain by reason of any improper, inadequate or incompetent treatment received at the United States Public Health Service Hospital. The primary obligation to which this undertaking related, was the duty of the hospital and its employees, to exercise due care in treating plaintiff. Plaintiff urges, however, that since *at the time of the defendant's promise* (which was before plaintiff entered the hospital) the hospital was under no obligation or duty to him, the defendant's promise did not relate to an *existing* obligation of another and, therefore, was not required to be in writing to be enforceable. Although there once may have been some doubts as to whether the applicability of the statute was limited to guarantees of a subsisting debt, see *D'Wolf* v. *Rabaud*, 26 U. S. (1 Pet.) 476, 499-500 (1828), it is now clear that a promise to answer for the default or miscarriage of another comes within the purview of the Statute without regard to the time when made, vis-a-vis the principal obligation. *D'Wolf* [fol. 12] v. *Rabaud*, supra; 2 *Corbin, op. cit.* § 347 & n. 39; *Simpson op. cit.* § 35 at p. 126; 2 *Williston, op. cit.* § 461 at p. 1333; 49 Am. Jur., *Statute of Frauds*, § 89 at p. 444; 37 C. J. S., *Statute of Frauds*, § 14 at p. 521; *Restatement, Contracts* § 180 and comment b (1932); *Restatement, Security* § 89, illustration 2 (1941). "[N]o distinction appears to be made by the authorities between an agreement to pay an antecedent debt and indebtedness to be created subsequent to the promise." *R. & L. Co.* v. *Metz*, 165 App. Div. 533, 538 (1st Dep't 1914), aff'd mem., 215 N. Y. 695 (1915).

Plaintiff characterizes the defendant's alleged undertaking as an "original" promise and from that premise proceeds to argue that it is out of the statute. The use of the terms "original" and "collateral" is not very helpful because they are not clearly defined and owing to the ambiguity of these terms the *Restatement of Contracts*, §§ 180 et seq., avoids their use. 2 *Williston, op. cit.* § 463 (rev. ed. 1936). See also *Brown* v. *Weber*, 38 N. Y. 187,

190 (1868); 2 *Corbin, op. cit.* § 348; *Simpson, op. cit.* § 35 (1950).

Where the promisor comes under an independent duty of payment irrespective of the liability of the principal debtor and the undertaking is founded on a new consideration moving to the promisor and beneficial to him, the undertaking is said to be "original", whereas if it is to answer for the debt, default or miscarriage of another it is characterized as "collateral". In *Bulkley* v. *Shaw*, 289 N. Y. 133, 137 (1942) the Court of Appeals set out the test as follows:

> "The elements of beneficial interest and new consideration must be present to take the case out of the statute; *but the inquiry remains whether the consideration is such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor.*" [Emphasis by the Court.]

[fol. 13] There are two requirements each of which must be satisfied to take an oral promise out of the statute; first, the defendant's promise must be based upon a consideration which moves to the defendant and benefits him, and secondly, the defendant must be under an independent duty of payment irrespective of the liability of the principal debtor. See *Richardson Press* v. *Allbright*, 224 N. Y. 497 (1918); *White* v. *Rintoul*, 108 N. Y. 222 (1888); *Zweighaft* v. *Lang*, 194 Misc. 370 (Sup. Ct. 1949), aff'd mem., 276 App. Div. 1017 (2d Dep't 1950); *Kahn* v. *Nadove, supra; Gibbs* v. *Holden, supra; Terminello* v. *Bleecker*, 155 Misc. 702 (N. Y. City Ct. 1935).

In order to satisfy the first requirement it is not enough to show that there was consideration for the promise because without a promise otherwise enforceable the question of the applicability of the Statute of Frauds is not reached. See *Bulkley* v. *Shaw, supra; Ackley* v. *Parmenter*, 98 N. Y. 425 (1885). The consideration moving to defendant must confer a direct and substantial benefit upon him. See, e.g., *Raabe* v. *Squier*, 148 N. Y. 81 (1895); *First National Bank* v. *Chalmers*, 144 N. Y. 432 (1894); *In Re Carlin's Will*, 201

Misc. 43 (Surr. Ct. 1951); *Smith* v. *Fredericks*, 146 Misc. 453 (Co. Ct. 1932); a mere detriment to or forbearance by the promisee, *White* v. *Rintoul*, *supra*; *Ackley* v. *Parmenter*, *supra*, or a moral or sentimental object, *Gibbs* v. *Holden*, *supra*, or slight and indirect possible advantages will not suffice. *Kahn* v. *Naitove*, *supra*.

It is difficult to perceive how the consideration moving to the defendant in the instant case could be deemed beneficial to it. A seaman who becomes ill in the service of his vessel is entitled to maintenance and cure, even though his ailment is not causally related to the employment. *Calmar Steamship Corp.* v. *Taylor*, 303 U. S. 525 (1938); *Rey* v. *Colonial Nav. Co.*, 116 F. 2d 580 (2d Cir. 1941). However, "[t]he seaman does not have a free hand in choosing his own physician and deciding on his own treatment." *Gilmore & Black, Admiralty* § 6-11 at p. 266 (1957). On the [fol. 14] contrary, it is settled law that an injured seaman who voluntarily rejects hospital care at a Marine Hospital[3] equipped to minister to his medical needs thereby forfeits his right to reimbursement from the shipowner for his hospital and medical expenditures. *Muruaga* v. *United States*, 172 F. 2d 318 (2d Cir. 1949); *Bailey* v. *City of New York*, 153 F. 2d 427 (2d Cir. 1946); *McManus* v. *Marine Transport Lines, Inc.*, 149 F. 2d 969 (2d Cir.), cert. denied, 326 U. S. 773 (1945); *The Saguache*, 112 F. 2d 482 (2d Cir. 1940); *The Bouker No. 2*, *supra*. When defendant tendered plaintiff a master's certificate (which plaintiff accepted and used) its obligation to furnish cure was discharged. See also *The Santa Barbara*, 263 Fed. 369 (2d Cir. 1920); *The Alpha*, 44 F. Supp. 809 (E. D. Pa. 1942). Plaintiff, as he admitted in answer to an interrogatory propounded to him, "was well aware that the usual duties of a steamship owner or operator were satisfied upon the furnishing of a captain's certificate to a United States Public Health Service Hos-

[3] The courts take cognizance of the availability of the Marine Hospital service where seamen who present a "master's certificate" are entitled to treatment at a minimum expense or without charge. *Calmar Steamship Corp.* v. *Taylor*, *supra*; *The Bouker No. 2*, 241 Fed. 831 (2d Cir.), cert. denied, 245 U. S. 647 (1917). See also *United States* v. *Loyola*, 161 F. 2d 126 (9th Cir. 1947).

pital * * * " The consideration for defendant's promise, therefore, could not and was not intended to confer any benefit upon it.

Bulkley v. *Shaw*, *supra* at 138-39, the most recent decision of the New York Court of Appeals treating with the aspect of the Statute of Frauds here involved, "quoted with approval" the test suggested in 2 *Williston*, *op. cit.*, § 475, i.e., Is the new promisor a surety?:

> "If, as between the promisor and the original debtor, the promisor is bound to pay, the debt is his own and not within the statute. *'Contrariwise if as between them the original debtor still ought to pay, the debt cannot be the promisor's own and he is undertaking to answer for the debt of another.'*" [Emphasis by the Court,]

[fol. 15] In the case at bar, as between defendant and those who negligently treated the plaintiff, the latter should bear the burden of making the plaintiff whole for the injuries allegedly suffered at their hands. See *Restatement, Security*, illustrations 3, 5 at pp. 225-26 (1941).

Although the defendant's promise to compensate plaintiff is alleged to have been absolute in *form* it is not by reason of that fact alone rendered original. See *Williston*, *op. cit.* § 467 at pp. 1348-49. The promise in substance is to answer for the default of another and must be in writing to be enforceable. "The ancient purpose of the Statute of Frauds was to require satisfactory evidence of a promise to answer for the debt of another person, and its efficacy should not be wasted by unsubstantial verbal distinctions." *Richardson Press* v. *Albright*, *supra*, at 502.

The New York Statute of Frauds precludes enforcement of the defendant's alleged oral promise. The issuance of the master's certificate to plaintiff and his use thereof to gain admittance to and utilize the facilities of the Marine Hospital did not constitute the shipowner an indemnitor against malpractice by or at that institution.[5]

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[5] But Cf. *Cortez* v. *Baltimore Insular Line*, 287 U. S. 367 (1932) (failure to provide cure held actionable); *Sims* v. *United States of America War Shipping Administration*, 186 F. 2d 972 (3d Cir.),

Motion to dismiss first count of the amended complaint is granted.

So ordered.

Dated: September 10, 1958.

ALEXANDER BICKS, United States District Judge.

[fol. 16]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORDER AND JUDGMENT APPEALED FROM—March 30, 1959

The plaintiff having regularly moved this Court for an order directing that judgment be entered dismissing the plaintiff's complaint, and said motion having duly come on to be heard before Hon. Gregory F. Noonan, United States District Judge on the 19th day of March, 1959,

Now, upon reading and filing the notice of motion dated March 3, 1959, the affidavit of Jacob Rassner, sworn to the 13th day of March, 1959, the stipulation dated October 30, 1958 and the order of Hon. Alexander Bicks, United States District Judge filed September 10, 1958, in support thereof, and Thomas H. Walker, Esq., attorney for the defendant having appeared but not opposed to said motion, and due deliberation having been had thereon, and the written memorandum of the Court having been filed herein, it is hereby

Ordered, that the second cause of action in the within cause be and hereby is discontinued without prejudice and without costs to either party and it is further

Ordered, that the first cause of action be and hereby is dismissed in accordance with the order of Hon. Alexander Bicks, United States District Judge filed September 10,

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cert. denied, 342 U. S. 816 (1951) (consequential damages recoverable for failure to provide maintenance and cure after termination of voyage when demanded). See also *Williams* v. *United States*, 228 F. 2d 129 (4th Cir. 1955), cert. denied, 351 U. S. 986 (1956).

1958, and the Clerk of this Court is hereby directed to mark his dockets and enter judgment accordingly.

Dated: New York, N. Y.,
March 30, 1959.

G. F. Noonan, U.S.D.J.
H. A. C.

Judgment Entered 3/31/59

Herbert A. Charlson, Clerk.

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 94-288

JOHN M. KOSSICK, Plaintiff,

—against—

UNITED FRUIT COMPANY, Defendant.

EXCERPTS FROM INTERROGATORIES PROPOUNDED BY THE DEFENDANT TO BE ANSWERED BY THE PLAINTIFF UNDER OATH—Filed February 28, 1957

* * * * * * *

[fol. 18] 12. State specifically the manner and fashion in which it is alleged that the vessel or vessels were unseaworthy so as to cause injury, illness or aggravation of a pre-existing condition to the plaintiff with respect to each and every illness or injury alleged in the complaint.

* * * * * * *

14. Enumerate each and every failure on the part of the defendant to take any means or precautions for the safety of the plaintiff or failure to provide the plaintiff

with a reasonably safe place wherein to work, resulting in injury, illness or aggravation as alleged in the complaint.

• • • • • • •

[fol. 19] Thomas H. Walker, Attorney for Defendant, Office & P. O. Address, Pier 9, North River, New York 6, New York.

To:

Jacob Rassner, Esq., Attorney for Plaintiff, 15 Park Row, New York 38, N. Y.

[fol. 20] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM ANSWERS TO INTERROGATORIES—
Filed May 31, 1957

• • • • • • • •

[fol. 21] 5. In the Fall of 1949, plaintiff became aware of an unusual degree of nervousness, tenseness and apprehension and tremors. In January of 1950, plaintiff noticed a lump in the region of his thyroid on the left side. Symptoms of nervousness and excitability, tenseness and apprehension continued to become worse until August of 1950, at which time the plaintiff was discharged from the [fol. 22] S. S. Cape Ann and the plaintiff was offered a master's certificate to go to the United States Public Health Service Hospital in Staten Island.

Prior thereto in between trips of approximately 20 to 30 days, the plaintiff was receiving treatment for his thyroid condition by a private doctor—Dr. Frick, 445 West 23rd Street, Borough of Manhattan, City of New York. Plaintiff had contracted with Dr. Frick to perform the necessary operation and furnish all post-operative medical treatment for the flat price of $350. Said price to include the hospitalization.

Plaintiff asked the defendant through its Medical Department, Captain MacCumber and George Halstead, the

port steward, to approve his receiving the medical and surgical treatment from Dr. Frick. The conferences were numerous and each time that this matter was taken up with the defendant through these parties, plaintiff was told that the maintenance as well as the cure would not be paid for by the defendant unless plaintiff went to the United States Public Health Service Hospital at Staten Island. Plaintiff repeatedly stated that he was willing to pay for his own medical treatment but that he did not wish to waive the maintenance because there was a probability that the convalescence following the operation might be extensive in point of time because of the symptoms which predated the operation, having continued for such a long period. Plaintiff stated that he did not wish to waive the maintenance under any circumstances even though he was willing to waive the cost of the said medical treatment. The defendant through all of these abovementioned persons represented to the plaintiff that if he waived his privilege of going to his own private doctor and instead went to the United States Public Health Service Hospital at Staten [fol. 23] Island for his treatment and operation, the defendant would be responsible for everything that happened and would make good any bad consequences or damage resulting from said treatment, thereby wrongfully preventing plaintiff from his choice of doctors.

The plaintiff repeatedly stated to all of the heretofore mentioned agents of the defendant that he had already had some very unpleasant experiences at the United States Public Health Service Hospital which made him shudder at the thought of going back there and specifically related the two experiences he had in mind. The first experience was in the year 1937, when the plaintiff went there with a nasal cold and before the plaintiff knew it and before the plaintiff could possibly get out of the hospital, he found himself being operated on for a sinus condition, which he was not even aware of having had and since that time the plaintiff has had all sorts of trouble with his nose which he had never had before. To this day, the plaintiff is convinced that that was an unnecessary operation and there was nothing he could do about avoiding it. There was no one he could talk to and obtain any sort of satisfaction. In

the same year, 1937, the plaintiff was sent to the same United States Public Health Service Hospital in Staten Island, having been referred there by the United States Public Health Service Hospital, Hudson and Jay Streets, where the plaintiff had received a most cursory examination by a specialist upon the complaint of the plaintiff that he was beginning to have tremors and nervousness. When this specialist touched his chest he immediately stated that the plaintiff had a thyroid condition which had to be corrected by surgery and immediately referred the plaintiff to the United States Public Health Service Hospital in Staten [fol. 24] Island. Upon his arrival there, the plaintiff was confined to a room for one solid period of three weeks, during which time he was never examined by anyone; was unable to obtain any sort of information or consultation and during which time he was compelled to share a room with another person by the name of Frank Atwood, a postal worker, who was suffering from active tuberculosis and who died two months later from that disease at a United States Tuberculosis Hospital in New York City, to which he was transferred.

All of these conversations merely resulted in reaffirmance of the premises of the defendant through these agents, that that was the only place that they would authorize treatment and that they guaranteed the results would be satisfactory and they would be responsible for any untoward or unexpected damages as feared. At that time, plaintiff was well aware that the usual duties of a steamship owner or operator were satisfied upon the furnishing of a captain's certificate to a United States Public Health Service Hospital but plaintiff became convinced that the defendants were making a separate contract to be responsible for anything that went astray as a result of plaintiff's treatment at the said hospital and in reliance on that representation, the plaintiff gave up his right to his own choice of doctors as an inducement to the defendant, so that the defendant would pay him maintenance. Plaintiff was fully aware that he had a right to maintenance, even though he chose his own doctor and hospital for treatment and was aware that he would be waiving the cost of the cure and medical treatment. This he was willing to waive, but he

was not willing to waive the maintenance which might be for an extended period of time, in view of the fact that the symptoms had lasted so long before the operation.

. . . . . .

[fol. 25]. 12. Plaintiff waives any claim of unseaworthiness.

. . . . . .

14. Plaintiff waives any claim of negligence with respect to a safe place wherein to work.

. . . . . .

[fol. 26]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN M. KOSSICK, Plaintiff,

—against—

UNITED FRUIT COMPANY, Defendant.

STIPULATION WAIVING UNSEAWORTHINESS AND JONES ACT CLAIMS—May 6, 1958

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, that the sole question for determination by the Court upon this motion is whether the complaint Answers to Interrogatories and examination before trial of plaintiff sets forth a cause of action in contract upon which relief may be granted.

It Is Further Stipulated and Agreed by and between the attorneys for the respective parties hereto, that for the purposes of this motion, plaintiff waives any claim or claims arising out of unseaworthiness or the Jones Act.

JACOB RASSNER, Attorney for Plaintiff

THOMAS H. WALKER, Attorney for Defendant

Dated: New York, New York, May 6, 1958

[fol. 27]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 65—October Term, 1959.

Argued November 18, 1959

Docket No. 25771

JOHN M. KOSSICK, Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY, Defendant-Appellee.

Before: Magruder, Medina and Friendly, Circuit Judges.

OPINION—February 23, 1960

Appeal from an order, Alexander Bicks, Judge, dismissing a complaint on the ground that the claim sued upon was barred by the New York Statute of Frauds. 166 F. Supp. 571. *Affirmed.*

Jacob Rassner, New York, N. Y. (Thomas F. Frawley, New York, N. Y., on the brief), for plaintiff-appellant.

Eugene Underwood, New York, N. Y. (Francis I. Fallon and Burlingham, Hupper & Kennedy, New York, N. Y., on the brief), for defendant-appellee.

[fol. 28] MAGRUDER, Circuit Judge:

Appeal is here taken from an order of the United States District Court for the Southern District of New York dismissing an amended complaint which appellant filed against United Fruit Company. 166 F. Supp. 571. It was alleged that appellant was working as chief steward on a vessel belonging to the United Fruit Co.; that while so working he suffered an illness which was not claimed to be attributable to any negligence or breach of duty by the defen-

dant; that the shipowner had a maritime obligation to supply the seaman with "maintenance and cure"; that appellant had engaged the services of a private physician to treat his illness, but that the shipowner wanted the seaman to be treated free of charge at a United States Public Health Service Hospital at Staten Island, New York; that United Fruit Co. agreed, on or before August 28, 1950, that if the seaman would discharge his private physician and become a patient at such United States Public Health Service Hospital, "defendant would assume all the responsibility of any improper, inadequate or incompetent treatment of whatever nature the plaintiff received at the hospital, or for the consequences of any lack of due treatment and nursing care and would compensate the plaintiff for any damages or ill effects that he would suffer by reason of his discharging Dr. Frick and in place thereof becoming a patient of the United States Marine Hospital"; that in reliance upon such agreement by the shipowner appellant did in fact become a patient of the United States Public Health Service Hospital, Staten Island, New York, on August 28, 1950; that on the same day he suffered injuries by being chemically burned about the rectum when a strong colonic was negligently administered by personnel employed by the hospital; that by reason of the foregoing the plaintiff became totally and permanently disabled and suf-
[fol. 29] fered damages in the amount of $250,000, for which judgment against defendant was prayed.

As the district judge observed, these allegations were bottomed "on contract and not on unseaworthiness or the Jones Act"; that this was not an oversight by the plaintiff "but rather a stratagem to resuscitate a claim time barred under the Jones Act." 166 F. Supp. at 573.

The basis of federal jurisdiction being alleged to depend on diversity of citizenship, the district judge thought that the contract sued on had to be governed, as respects its validity, by the New York Statute of Frauds, which provided in N. Y. Personal Property Law §31(2) that every agreement is void, unless it is contained in a memorandum signed by the party to be charged, if such agreement "[i]s a special promise to answer for the debt, default or miscarriage of another person."

Great reliance is placed by appellant upon the decision in *Union Fish Co.* v. *Erickson*, 248 U. S. 308 (1919), to the effect that a maritime contract cannot be nullified in an admiralty court by a State Statute of Frauds. We shall assume that *Union Fish Co.* v. *Erickson* is still the applicable law and that the decision therein has not been modified by subsequent decisions. Nevertheless it is obvious that it applies only to "maritime contracts." The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment. See *Pacific Surety Co.* v. *Leatham & Smith &c. Co.*, 151 Fed. 440 (C. A. 7th, 1907); *Clinton* v. *International Organization of Masters, &c.*, 254 F. 2d 370 (C. A. 9th, 1958). For all that appears in the complaint, it may well be that the contract sued on was allegedly made after the maritime contract of employment of the plaintiff [fol. 30] had been terminated. It really makes no difference whether this is so or not. All that remained was the performance by the shipowner of its undisputed obligation to supply maintenance and cure. The shipowner supplied plaintiff with a master's certificate, which was used by him to obtain admittance as a patient in the United States Public Health Service Hospital. See *The Bouker No. 2*, 241 Fed. 831, 835 (C. A. 2d, 1917), cert. denied sub nom. *Jones* v. *Bouker Contracting Co.*, 245 U. S. 647 (1917). That took care of the obligation to furnish "cure." As to the obligation to furnish maintenance, it is true that the amended complaint also contained a second count alleging that defendant failed and refused to supply plaintiff with the expenses of his maintenance and cure. But in the order appealed from, this second cause of action was discontinued "without prejudice and without costs to either party"; and appellant makes no objection to this action by the trial judge.

A judgment will be entered affirming the order of the District Court.

[fol. 31]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOHN M. KOSSICK, Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY, Defendant-Appellee.

JUDGMENT—February 23, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

[fol. 32] (File Endorsement omitted.)

[fol. 33] Clerk's Certificate to foregoing Transcript (omitted in printing).

[fol. 34]

SUPREME COURT OF THE UNITED STATES

No. 952—October Term, 1959

JOHN M. KOSSICK, Petitioner,

—vs.—

UNITED FRUIT COMPANY.

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[redacted]

FILE COPY

Supreme Court of the United States

October Term, 1959

No. 952 96

JOHN M. KOSSICK,

Petitioner,

against

UNITED FRUIT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

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Cases Cited

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Supreme Court of the United States

October Term, 1959

No.

JOHN M. KOSSICK,

Petitioner,

against

UNITED FRUIT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 23, 1960.

Questions Presented

1. Whether a state statute[1] is legally sufficient to bar an action for breach of a maritime contract, which but for such state statute, would constitute a valid and meritorious cause of action.

2. Whether the right to maintenance and cure, considered a maritime contract from the time when the "mind of man runneth not to the contrary," changes its nature when the shipowner substitutes in place of its obligation, a promise to pay money on land.

---

[1] New York Personal Property Law, Section 31, commonly known as Statute of Frauds.

3. Is a shipowner's obligation to provide maintenance and cure terminated the instant a seaman enters a U. S. Marine Hospital for treatment?

4. Is the shipowner/employer or the United States Government or are both charged with legal responsibility for surgical malpractice, after a seaman enters a United States Public Health Service Hospital?

Opinion Below

The opinion of the United States District Court for the Southern District of New York, dated September 10, 1958 is reported at 166 F. Supp. 571.

The opinion of the Court of Appeals for the Second Circuit is reported at 275 F. 2d 500.

Jurisdiction of this Court

The judgment of the Court of Appeals was entered on February 23, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Reasons for Granting the Writ

1. There is a conflict of authority between the holding by the Court below, the United States Court of Appeals for the Second Circuit, and the holding in *Union Fish Company* v. *Erickson*, 235 F. 385, by the United States Court of Appeals for the Ninth Circuit, affirmed 248 U. S. 308, 39 S. Ct. 112.

2. A state statute (Statute of Frauds) has been erroneously construed.

3. The Court below has erroneously invoked state law, thereby superseding and destroying long established principles of maritime law.

4. The decision below constitutes a radical departure from the ancient and well established law controlling shipowners' maritime obligations, to provide their seamen with maintenance for their living expenses while sick or injured.

5. The decision of the Court below destroys freedom of action, as to a seaman retaining a doctor of his own choosing and at his own expense, at the risk of deprivation of his living expenses.

Statement

Petitioner, a seaman, employed by respondent in the capacity of chief steward, suffered a disability during the course of his employment, which required treatment.

Petitioner made arrangements for such treatment with his private physician as he had serious and well founded objection to being treated by the Public Health Service.

Respondent compelled petitioner to discharge his private doctor on the threat of refusing to give him his maintenance unless he did so, and agreed that it would be responsible for any ill effects resulting from petitioner's discharge of his doctor and accepting the services of the United States Public Health Service in his stead.

The factual situation is set forth in plaintiff's answer to defendant's interrogatory #5.

> "5. In the Fall of 1949, plaintiff became aware of an unusual degree of nervousness, tenseness and apprehension and tremors. In January of 1950, plaintiff noticed a lump in the region of his thyroid on the left side. Symptoms of nervousness and excitability, tenseness and apprehension continued to

become worse until August of 1950, at which time the plaintiff was discharged from the S.S. CAPE ANN and the plaintiff was offered a master's certificate to go to the United States Public Health Service Hospital in Staten Island.

Prior thereto in between trips of approximately 20 to 30 days, the plaintiff was receiving treatment for his thyroid condition by a private doctor—Dr. Frick, 445 West 23rd Street, Borough of Manhattan, City of New York. Plaintiff had contracted with Dr. Frick to perform the necessary operation and furnish all post-operative medical treatment for the flat price of $350. Said price to include the hospitalization.

Plaintiff asked the defendant through its Medical Department, Captain MacCumber and George Halstead, the port steward, to approve his receiving the medical and surgical treatment from Dr. Frick. The conferences were numerous and each time that this matter was taken up with the defendant through these parties, plaintiff was told that the maintenance as well as the cure would not be paid for by the defendant unless plaintiff went to the United States Public Health Service Hospital at Staten Island. Plaintiff repeatedly stated that he was willing to pay for his own medical treatment but that he did not wish to waive the maintenance because there was a probability that the convalescence following the operation might be extensive in point of time because of the symptoms which predated the operation, having continued for such a long period. Plaintiff stated that he did not wish to waive the maintenance under any circumstances even though he was willing to waive the cost of the said medical treatment. The defendant through all of those above mentioned persons represented to the plaintiff that if he waived his privilege of going to his own private doctor and instead went to the United States Public Health Service Hospital at Staten Island for his treatment and operation, the defendant would be responsible for everything that happened and would make good any bad consequences or damage resulting from said treatment, thereby wrongfully preventing plaintiff from his choice of doctors.

The plaintiff repeatedly stated to all of the heretofore mentioned agents of the defendant that he had already had some very unpleasant experiences at the United States Public Health Service Hospital which made him shudder at the thought of going back there and specifically related the two experiences he had in mind. The first experience was in the year 1937, when the plaintiff went there with a nasal cold and before the plaintiff knew it and before the plaintiff could possibly get out of the hospital, he found himself being operated on for a sinus condition, which he was not even aware of having had and since that time the plaintiff has had all sorts of trouble with his nose which he had never had before. To this day, the plaintiff is convinced that that was an unnecessary operation and there was nothing he could do about avoiding it. There was no one he could talk to and obtain any sort of satisfaction. In the same year, 1937, the plaintiff was sent to the same United States Public Health Service Hospital in Staten Island, having been referred there by the United States Public Health Service Hospital, Hudson and Jay Streets, where the plaintiff had received a most cursory examination by a specialist upon the complaint of the plaintiff that he was beginning to have tremors and nervousness. When this specialist touched his chest he immediately stated that the plaintiff had a thyroid condition which had to be corrected by surgery and immediately referred the plaintiff to the United States Public Health Service Hospital in Staten Island. Upon his arrival there, the plaintiff was confined to a room for one solid period of three weeks, during which time he was never examined by anyone, was unable to obtain any sort of information or consultation and during which time he was compelled to share a room with another person by the name of Frank Atwood, a postal worker, who was suffering from active tuberculosis and who died two months later from that disease at a United States Tuberculosis Hospital in New York City, to which he was transferred.

All of these conversations merely resulted in reaffirmance of the promises of the defendant through these agents, that that was the only place

that they would authorize treatment and that they guaranteed the results would be satisfactory and they would be responsible for any untoward or unexpected damages as feared. At that time, plaintiff was well aware that the usual duties of a steamship owner or operator were satisfied upon the furnishing of a captain's certificate to a United States Public Health Service Hospital but plaintiff became convinced that the defendants were making a separate contract to be responsible for anything that went astray as a result of plaintiff's treatment at the said hospital and in reliance on that representation, the plaintiff gave up his right to his own choice of doctors as an inducement to the defendant, so that the defendant would pay him maintenance. Plaintiff was fully aware that he had a right to maintenance, even though he chose his own doctor and hospital for treatment, and was aware that he would be waiving the cost of the cure and medical treatment. This he was willing to waive, but he was not willing to waive the maintenance which might be for an extended period of time, in view of the fact that the symptoms had lasted so long before the operation."

The United States Public Health Service, while treating appellant for a thyroid condition, gave him a rectal anesthesia with full strength medication, without diluting same as required, which medication resulted in destroying appellant's tissue. The tissue around the anus was destroyed so badly that he required a colostomy, first on December 22, 1950 on one side of his body, which became infected, requiring a second colostomy on January 26, 1951 on the other side of his body.

POINT I

There is a conflict of authority between the holding by the Court below, the United States Court of Appeals for the Second Circuit, and the holding in *Union Fish Company* v. *Erickson*, 235 F. 385, for the Ninth Circuit, affirmed 248 U. S. 308, 39 S. Ct. 112.

The Court below overruled the decision in the case of *Union Fish Company* v. *Erickson, supra.*

The learned Court below, while it did "assume" that the holding in *Union Fish Company* v. *Erickson, supra,* was still the law, then by labelling the ancient maritime obligation as "not a maritime contract, since it was merely a promise to pay money on land * * *," in effect overruled said decision and destroyed the effect thereof.

The distinction drawn by the Court below has been unsuccessfully urged at prior times and always rejected.

Judge Leibell, in the case of *Northern Star S.S. Co.* v. *Kansas Milling Co.*, 75 F. Supp. 534, stated as follows at page 536:

> "(5-6) The fact that a contract is not in writing does not bar a suit thereon in admiralty. American Hawaiian S.S. Co. v. Willfuehr, D. C. Md. 1921, 274 F. 214, affirmed United States Fidelity & Guaranty Co. v. American-Hawaiian S.S. Co., 4 Cir., 1922, 280 F. 1023. A state Statute of Frauds is inapplicable to maritime contracts. In Union Fish Company v. Erickson, 248 U. S. 308, at page 314, 39 S. Ct. 112, 113, 63 L. Ed. 261, Mr. Justice Day stated the reason for the rule as follows: 'If one state may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a state may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rule of the states'."

See also cases cited post under Point III.

POINT II

A state statute (statute of frauds) has been erroneously construed.

The shipowner was bound to provide adequate maintenance and cure.

Such obligation constitutes the shipowner the original obligor and not an indemnitor.

The right to maintenance is a contractual obligation between shipowner and seaman. It is a basic and integral element of the employment contract. *Farrell* v. *United States*, 336 U. S. 511, 69 S. Ct. 707; *Lindgren* v. *Shepard S.S. Co.*, 108 F. 2d 806.

The interpretation by the Court below is an erroneous interpretation of the law. The correct interpretation is to be found in the New York State Court decisions, such as *Bulkley* v. *Shaw*, 289 N. Y. 133, at pages 138, 139 (14a):

> "If, as between the promisor and the original debtor, the promisor is bound to pay, the debt is his own and not within the statute. 'Contrariwise if as between them the original debtor still ought to pay, the debt cannot be the promisor's own and he is undertaking to answer for the debt of another.'"

This language recognizes the distinction in the legal obligation here, namely:

> (1) Is it one that the "promisor is bound to pay" in which event it is its own obligation and not within the statute?
>
> or
>
> (2) Is it one that the original debtor "still ought to pay" which renders the obligation not that of the promisor but one "to answer for the debt, default or miscarriage of another person"?

Fundamentally, a shipowner should not be permitted to escape its legal obligation to provide a seaman with maintenance and cure by other promises.

POINT III

The Court below has erroneously invoked State Law as superseding and destroying long established principles of maritime law.

THE NEW YORK STATUTE OF FRAUDS IS NOT A LEGAL DEFENSE IN ANY MARITIME ACTION ARISING OUT OF THE OBLIGATION OF A SHIPOWNER TO FURNISH MAINTENANCE AND CURE.

The law is elementary both in the New York and Federal Courts that it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law or affect rights thus created.

In *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402, 405-6:

> "Since it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. ed. 834), we must look to the decisions of the Federal Courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal Courts."

This rule was adopted in *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314.

In *Pope and Talbott Inc.* v. *Hawn*, 346 U. S. 406, 409-410, 74 S. Ct. 202, the Court stated:

> "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court".

In *Frame* v. *City of New York*, 34 Fed. Supp. 194, defendant moved to dismiss the complaint claiming damages for personal injuries under the Jones Act and also for

maintenance and cure on the ground the plaintiff had failed to file with the City of New York the notice of accident and injury, and claim for damages as required by the laws of the State of New York. This motion was summarily rejected by District Judge Bondy and in the course of his opinion he stated: "The Statutory requirements relied upon by the defendant are also inconsistent with the uniform operation of the maritime law in so far as the action for maintenance and cure is concerned." "The local rules respecting municipal liability in tort may be overridden 'by the law of the sea'."

See:

Cox v. *Roth*, 248 U. S. 207, 75 S. Ct. 242.

POINT IV

The decision below constitutes a radical departure from the ancient and well established law controlling shipowners' maritime obligations to provide their seamen with maintenance for their living expenses while sick or injured.

The time proven effect of the obligation for maintenance and cure, is expressed by Judge Cardozo in *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 53 S. Ct. 173, in which case he defines the obligation of maintenance and cure as a maritime contractual obligation in the following language at page 174:

> "A remedy is his also if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure.' The duty to make such provision is imposed by the law itself as one annexed to the employment. The Osceola, supra.* Contractual it is in the sense that it has its source in a relation which is contractual in origin, but, given the relation, no agreement is competent to abrogate the

* *The Osceola*, 189 U. S. 158, 23 S. Ct. 483.

incident. If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him; the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. The Iroquois, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955."

Our Courts have consistently refused to accept excuses by shipowners for failure to provide living expenses and reasonable medical and surgical treatment, and have always held the shipowner liable for the consequences of such breach of their ancient maritime obligation to provide maintenance and cure.

Dictatorial powers have been granted shipowners to compel seamen to submit to surgical treatment at the hands of doctors, not of their choosing and in whom they have no confidence, and in effect to become guinea pigs for experimental and training purposes at marine hospitals over the protest of said injured seaman, at the threat of withholding payment of maintenance, even though the seaman chooses to forego free hospitalization and pay for it at his own expense.

This takes on a tone of slavery and should not be tolerated in the United States of America.

Mindful of the wonderful and humanitarian work accomplished by our United States Public Health Service Hospitals, nevertheless the dignity of man must be upheld and an American citizen should not be denied freedom of choice, particularly as to surgical treatment.

POINT V

The decision of the Court below destroys freedom of action, at seaman's own expense of retaining a doctor of his own choosing, at the risk of deprivation of his living expenses.

The decision of the Court below, in effect, destroys personal liberty and dignity of man, in that a shipowner is vested with dictatorial powers, by means of economic pressure, to coerce a seaman to submit to surgery at the hands of doctors in whom he has no confidence and whose work he fears, irrespective of the fact that the seaman undertakes to obtain a doctor at his own expense.

In the case of *The Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, back in 1903, the Supreme Court held that an employer could not escape responsibility for any damage caused by inadequate treatment of an ill or injured seaman.

Certainly, the consequences of bad treatment is not assumed by the seaman. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 59 S. Ct. 262.

The duty to provide maintenance and cure finds its origin in ancient maritime law. It arises out of a personal indenture by which the seaman is bound to his ship and, in return, the vessel is bound to him in maintenance and cure. *Erlochasson* v. *Freeport Sulphur* (1925), 7 F. 2d 674.

See also:

Sims v. *United States of America War Shipping Adm'n*, 186 F. 2d 972;
Troy, D. C. W. D. N. Y. 1902, 121 F. 901.

The seaman is not in a position of equal bargaining with the shipowner.

It is, indeed, unrealistic to require a seaman in need of surgery or medication to negotiate and wait for a written commitment from his employer, particularly where his ailment requires prompt attention.

Nothing seems more unfair, unjust and unreasonable than to deny to a seaman the right to enforce his employer's promise on the basis that it was not made in writing.

The law is well settled that one exercising coercive and oppressive acts is responsible for the consequences thereof.

The shipowner unquestionably had the original obligation to provide maintenance and cure. It failed to do so and substituted in place thereof an oral contract. It breached its oral contract.

The Court below has ruled that the shipowner may not be held responsible for the breach of its contract because:

1. It was not in writing.

2. Its obligation to provide proper and adequate cure terminated when the seaman entered a Marine Hospital.

We submit that such holding is contrary to the humanitarian, fair and just action so clearly demonstrated by the Supreme Court in the case of *Bisso* v. *Inland Waterways Corporation*, 75 S. Ct. 629, 349 U. S. 85 as to what constitutes fair bargaining.

The shipowner used economic pressure as the means whereby it destroyed petitioner's freedom of choice as to a surgeon at petitioner's own expense, by refusing to give him maintenance for living expenses unless said seaman capitulated to the wishes of the shipowner, discharge Dr. Frick whom he had retained, and enter a Marine Hospital instead.

Conclusion

All seamen are vitally concerned as to whether or not their ancient maritime rights to maintenance and cure are subject to curtailment by state law and/or judicial decision, destructive of and a radical departure from, ancient and well established principles of admiralty law.

By reason of the foregoing, petitioner prays on behalf of himself and all seamen having need of the protection of our Courts, that this Honorable Court take under advisement the questions herein presented by granting the petition for a writ of certiorari.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

Before:

MAGRUDER, MEDINA and FRIENDLY,
Circuit Judges.

MAGRUDER, *Circuit Judge*:

Appeal is here taken from an order of the United States District Court for the Southern District of New York dismissing an amended complaint which appellant filed against United Fruit Company. 166 F. Supp. 571. It was alleged that appellant was working as chief steward on a vessel belonging to the United Fruit Co.; that while so working he suffered an illness which was not claimed to be attributable to any negligence or breach of duty by the defendant; that the shipowner had a maritime obligation to supply the seaman with "maintenance and cure"; that appellant had engaged the services of a private physician to treat his illness, but that the shipowner wanted the seaman to be treated free of charge at a United States Public Health Service Hospital at Staten Island, New York; that United Fruit Co. agreed, on or before August 28, 1950, that if the seaman would discharge his private physician and become a patient at such United States Public Health Service Hospital, "defendant would assume all the responsibility of any improper, inadequate or incompetent treatment of whatever nature the plaintiff received at the hospital, or for the consequences of any lack of due treatment and nursing care and would compensate the plaintiff for any damages or ill effects that he would suffer by reason of his discharging Dr. Frick and in place thereof becoming a patient of the United States Marine Hospital"; that in reliance upon such agreement by the shipowner appellant did in fact become a patient of the United States Public Health Service Hospital, Staten Island, New York, on August 28, 1960; that on

the same day he suffered injuries by being chemically burned about the rectum when a strong colonic was negligently administered by personnel employed by the hospital; that by reason of the foregoing the plaintiff became totally and permanently disabled and suffered damages in the amount of $250,000, for which judgment against defendant was prayed.

[1] As the district judge observed, these allegations were bottomed "on contract and not on unseaworthiness or the Jones Act"; that this was not an oversight by the plaintiff "but rather a stratagem to resuscitate a claim time barred under the Jones Act." 166 F. Supp. at page 573.

The basis of federal jurisdiction being alleged to depend on diversity of citizenship, the district judge thought that the contract sued on had to be governed, as respects its validity, by the New York Statute of Frauds, which provided in N. Y. Personal Property Law, § 31, subd. 2 that every agreement is void, unless it is contained in a memorandum signed by the party to be charged, if such agreement "[i]s a special promise to answer for the debt, default or miscarriage of another person."

[2, 3] Great reliance is placed by appellant upon the decision in Union Fish Co. v. Erickson, 1919, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261, to the effect that a maritime contract cannot be nullified in an admiralty court by a State Statute of Frauds. We shall assume that Union Fish Co. v. Erickson is still the applicable law and that the decision therein has not been modified by subsequent decisions. Nevertheless it is obvious that it applies only to "maritime contracts." The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment. See Pacific Surety Co. v. Leatham & Smith Co., 7 Cir., 1907, 151 F. 440; Clinton v. International Organization of Masters, 9 Cir., 1958, 254 F. 2d 370. For all that appears in the complaint, it

may well be that the contract sued on was allegedly made after the maritime contract of employment of the plaintiff had been terminated. It really makes no difference whether this is so or not. All that remained was the performance by the shipowner of its undisputed obligation to supply maintenance and cure. The shipowner supplied plaintiff with a master's certificate, which was used by him to obtain admittance as a patient in the United States Public Health Service Hospital. See The Bouker No. 2, 2 Cir., 1917, 241 F. 831, 835, certiorari denied sub nom. Jones v. Bouker Contracting Co., 1917, 245 U. S. 647, 38 S. Ct. 9, 62 L. Ed. 529. That took care of the obligation to furnish "cure." As to the obligation to furnish maintenance, it is true that the amended complaint also contained a second count alleging that defendant failed and refused to supply plaintiff with the expenses of his maintenance and cure. But in the order appealed from, this second cause of action was discontinued "without prejudice and without costs to either party"; and appellant makes no objection to this action by the trial judge.

A judgment will be entered affirming the order of the District Court.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of February, one thousand nine hundred and sixty.

Present:

HON. CALVERT MAGRUDER,
HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
Circuit Judges.

JOHN M. KOSSICK,
Plaintiff-Appellant,

v.

UNITED FRUIT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1959

No. 96

JOHN M. KOSSICK,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

EUGENE UNDERWOOD
Counsel for Respondent

New York, N. Y.
June 8, 1960.

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Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

JOHN M. KOSSICK,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Facts and Proceedings Below

Petitioner's presentation is incomplete and misleading. These are the facts:

In 1950 petitioner developed thyroid trouble while chief steward on respondent's ship. He was given a "master's certificate" which entitled him to free treatment at the United States Public Health Service Hospital. While he was a patient there he was chemically burned about the rectum when a strong colonic was negligently administered by Public Health Service Hospital personnel.

This action to recover damages for those injuries was begun on July 20, 1954, too late to sue either the Hospital or respondent in tort. After extensive discovery proceedings, plaintiff, in June 1958, served an amended complaint based on diversity of citizenship. In an attempt to bring himself under the six year statute of limitations, the tort

time having expired, plaintiff alleges that in August 1950 he had made arrangements for treatment with a private physician, which he relinquished upon defendant's oral promise to pay him damages for any injury he might suffer at the Public Health Service Hospital, if he should go there for treatment. As Bicks, *D.J.* said, 166 F. Supp. 571, 573-4:

> "As appears, the first count is bottomed on contract and not on unseaworthiness or the Jones Act, 46 U. S. C. A. §688. This is not an oversight but rather a stratagem to resuscitate a claim time barred under the Jones Act. • • • The amended complaint also contains a count for maintenance and cure. The sufficiency of that count is not questioned upon the instant application."

In answers to interrogatories, plaintiff explicitly waived any claim of unseaworthiness or negligence, Appendix, *infra* p. 7.

Respondent moved to dismiss the amended complaint. Petitioner stipulated that the sole question was whether the amended complaint sets forth a cause of action *in contract* upon which relief may be granted, and renewed his waiver of any claim based upon unseaworthiness or Jones Act negligence, Appendix, *infra* p. 7.

Bicks, *D.J.* granted the motion on the ground that respondent's alleged promise to pay damages for any malpractice of the Hospital, a promise to answer for the default of another, was void under the New York Statute of Frauds, *Kossick* v. *United Fruit Company*, 166 F. Supp. 571.

Subsequently, petitioner discontinued his second cause of action in the amended complaint, which asserted a claim for maintenance and cure, Appendix, *infra* p. 8.

The Court of Appeals affirmed on the ground that petitioner's claim is based solely upon an alleged oral, non-maritime, contract to answer for the default of the Hospital, unenforceable under the New York Statute of Frauds, *Kossick* v. *United Fruit Company*, 275 F. 2nd, 500.

The only question below, as here, was whether such an oral contract can be enforced despite the Statute of Frauds.

Reasons for Not Granting the Writ

There is no conflict with *Union Fish Co.* v. *Erickson*, 248 U. S. 308. The contract there was for service as master of a vessel, plainly maritime. Here, as the Court of Appeals said:

> "The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment."

To be maritime in nature the contract must deal with a maritime service or transaction, commerce or navigation. *Insurance Co.* v. *Dunham*, 11 Wall. 1; *North Pacific SS. Co.* v. *Hall Bros.*, 249 U. S. 119; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469; *Pacific Surety Co.* v. *Leatham*, 151 Fed. 440 (7 Cir.); *Eadie* v. *North Pacific SS. Co.*, 217 F. 662; *Berwind-White Coal Co.* v. *City of New York*, 135 F. 2d 443 (2 Cir.). Two other cases are particularly apposite: *Clinton* v. *Int'l. Org. of Masters, etc.*, 254 F. 2d 370 (9 Cir.), and *Mulvaney* v. *Dalzell Towing Co.*, 90 F. Supp. 259.

Even if a contract is maritime in nature, State law is freely applied. In *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, Mr. Justice Black wrote:

"But it does not follow, as the Courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined Admiralty rule" (p. 313).

There this Court held that a maritime contract was controlled by Texas local law in the absence of a federal Admiralty rule.

In *The Tungus* v. *Skovgaard*, 358 U. S. 588, and in *Hess* v. *United States*, 361 U. S. 314, this Court permitted recovery for deaths resulting from maritime torts pursuant to State acts.

In *Romero* v. *International Term. Co.*, 358 U. S. 354, Mr. Justice Frankfurter wrote:

"It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity. 'In the field of maritime contracts,' this Court has said, 'as in that of maritime torts, the National Government has left much regulatory power

in the States.' Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history" (pp. 373-4).

See also *Goett* v. *Union Carbide Corp.*, 361 U. S. 340.

Statutes of Frauds, such as New York's applied below, are found in all the states. They do not conflict with any maritime concept and their application will result in substantial uniformity because of their universality. Statutes of Frauds were long ago conceived as a necessary restraint on a very human tendency to resort to a little "larceny" on occasion to support claims. Seamen have not been noteworthy for any lack of such tendency. To hold Statutes of Frauds inapplicable to such contracts as alleged here would expose a shipping industry already sorely beset by ever-widening liabilities and ever-increasing damage awards to an additional avalanche of fraudulent claims.

CONCLUSION

The petition should be denied.

Respectfully submitted,

EUGENE UNDERWOOD
Counsel for Respondent

New York, N. Y.
June 8, 1960.

APPENDIX

Interrogatories and Answers

Interr. 12. State specifically the manner and fashion in which it is alleged that the vassel or vessels, were unseaworthy so as to cause injury, illness or aggravation of a pre-existing condition to the plaintiff with respect to each and every illness or injury alleged in the complaint.

Ans. 12. Plaintiff waives any claim of unseaworthiness.

Interr. 14. Enumerate each and every failure on the part of the defendant to take any means or precautions for the safety of the plaintiff or failure to provide the plaintiff with a reasonably safe place wherein to work, resulting in injury, illness or aggravation as alleged in the complaint.

Ans. 14. Plaintiff waives any claim of negligence with respect to a safe place wherein to work.

Stipulation

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that the sole question for determination by the Court upon this motion is whether the complaint, Answers to Interrogatories and examination before trial of plaintiff sets forth a cause of action in contract upon which relief may be granted.

IT IS FURTHER STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that for the purposes of this motion, plaintiff waives any claim or claims arising out of unseaworthiness or the Jones Act.

JACOB RASSNER
Attorney for Plaintiff

THOMAS H. WALKER
Attorney for Defendant

Dated: New York, New York
May 6, 1958

Judgment

The plaintiff having regularly moved this Court for an order directing that judgment be entered dismissing the plaintiff's complaint, * * * it is hereby

ORDERED, that the second cause of action in the within cause be and hereby is discontinued without prejudice and without costs to either party and it is further

ORDERED, that the first cause of action be and hereby is dismissed in accordance with the order of Hon. Alexander Bicks, United States District Judge filed September 10, 1958, and the Clerk of this Court is hereby directed to mark his dockets and enter judgments accordingly.

Dated: New York, N. Y.
March 30, 1959

/s/ G. F. NOONAN
U.S.D.J.

Judgment Entered 3/31/59
HERBERT A. CHARLSON
Clerk

Supreme Court of the United States

October Term, 1960

No. 96

JOHN M. KOSSICK,

Petitioner,

against

UNITED FRUIT COMPANY,

Respondent.

PETITIONER'S BRIEF

JACOB RASSNER,
Attorney for Petitioner.

MONTE K. RASSNER,
THOMAS F. FRAWLEY,
on the Brief.

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Supreme Court of the United States

October Term, 1960

No. 96

JOHN M. KOSSICK,

Petitioner.

against

UNITED FRUIT COMPANY,

Respondent.

PETITIONER'S BRIEF

Petitioner's prayer that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case was granted on the 27th day of June, 1960.

Questions Presented

1. Whether a state statute[1] is legally sufficient to bar an action for breach of a maritime contract, which but for such state statute, would constitute a valid and meritorious cause of action?

2. Whether the right to maintenance and cure, considered a maritime contract from the time when the "mind of man runneth not to the contrary," changes its nature when the shipowner substitutes in places of its obligations, a promise to pay money on land?

[1] New York Personal Property Law, Section 31, commonly known as Statute of Frauds.

3. Is a shipowner's obligation to provide maintenance and cure terminated the instant a seaman enters a U. S. Marine Hospital for treatment?

4. Is the shipowner-employer, or the United States Government, or both, charged with legal responsibility for surgical malpractice, after a seaman enters a United States Public Health Service Hospital?

Opinion Below

The opinion of the United States District Court for the Southern District of New York, dated September 10, 1958 is reported at 166 F. Supp. 571.

The opinion of the Court of Appeals for the Second Circuit is reported at 275 F. 2d 500.

Jurisdiction of this Court

The judgment of the Court of Appeals was entered on February 23, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Statement

The facts are set forth at pages 16, 17, 18 and 19 of the record.

The United States Public Health Service, while treating petitioner for a thyroid condition, gave him a rectal anesthesia with full strength medication, without diluting same as required, which medication resulted in destroying petitioner's tissue. The tissue around the anus was destroyed so badly that he required a colostomy, first on December 22, 1950 on left side of his body, which became infected, requiring a second colostomy on January 26, 1951 on the right side of his body (p. 5).

POINT I

It was error to hold that a seaman's right to maintenance and cure was not a maritime contract or that it ceased being a maritime contract during performance of its conditions ashore.

The Court below stated at page 22 (record):

> "The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seamen should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment."

The foregoing constitutes erroneous and radical departure from well established law.

The applicable law was clearly expressed by Judge Learned Hand in the leading case in point, *The Pozan*, 276 Fed. 418, at page 433:

> "Obviously if that contract was maritime enough in its character to base a libel upon it in contract, the injury resulting from the wrongful act on shore was as maritime, because it was the same thing."

It is difficult to comprehend why *The Pozan, supra*, was not recognized as authoritative on February 23, 1960, the date of decision by the Court below, when thereafter and on June 29, 1960, the very same case was cited with approval by the Court of Appeals for the Second Circuit in the case of *Monteiro* v. *Sociedad Maritima San Nicolas, S.A.*, 280 F. 2d 568, at page 571.

The fact that a claim is bottomed on seaman's employment for damages suffered ashore does not render such claim divisible so as to be governed in part by maritime law, and the remainder by State law.

The obligation of a shipowner to provide maintenance and cure is as maritime as navigation itself, is as universal

as civilization, constituting an integral part of all ancient sea codes, adopted by usages of all maritime nations, universally held at all times to constitute part of the expenses of the trade, as well as an important basic benefit, protection and compensation for seamen.

A seaman's right to maintenance and cure is older, by many centuries,[1] than the States of the Union, and no State law is competent to alter or abolish these rights.[2]

The proximate cause which set in motion the series of events leading to petitioner's disability was the failure of the shipowner to meet its maritime obligation to provide prompt, adequate and proper maintenance and cure.

That such obligation is maritime in nature has never been disputed prior to the decision in the Court below in the case at bar.

Since ancient times, as enunciated by the authority of *Cleirac, Jugmens d'Oleron,* Arts. 6 and 7 and notes by Cleirac; *Consolato del Mare,* cc. 182, 187; 2 Park Coll. Mar. 152, up to recent times, a shipowner's obligation for maintenance and cure has always been considered as an integral part of maritime shipping.

The D.S. Cage, Fed. Cas. No. 2,002, 1 Woods, 401.

By maritime law, a seaman falling sick during the voyage is to be cured at the expense of the vessel.

The Happy Return, Fed. Cas. No. 13,697, 1 Pet. Adm. 253 (D. C. Pa. 1799);
The Nimrod, Fed. Cas. No. 10,267, 1 Ware, (9) 1 (D. C. Me. 1822);
The Forest, Fed. Cas. No. 4,936, 1 Ware, (420) 429 (D. C. Me. 1837);

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[1] *Mitchell* v. *Trawler Racer, Inc.*, 80 S. Ct. 926, 929 (footnotes 5, 6), 938 (footnote 5).

[2] See cases cited under Point II of this Brief.

Brunent v. *Taber*, Fed. Cas. No. 2,054, 1 Spr. 243, 18 Law Rep. 685 (D. C. Mass. 1854).

The Supreme Court of the United States has clearly established that the obligation of a shipowner to provide maintenance and cure is a maritime obligation.

Calmer Steamship Corp. v. *Taylor*, 303 U. S. 525, 58 S. Ct. 651;
Aguilar v. *Standard Oil Co. of New Jersey*, 318 U. S. 724, 63 S. Ct. 930;
Farrell v. *United States*, 336 U. S. 511, 69 S. Ct. 707.

POINT II

No State may enact a statute limiting seamen's rights.

A seamen's right to maintenance and cure, being one rooted in federal maritime law, a State may not limit or prejudice the characteristic features of such general maritime law.

Southern Pacific Co. v. *Jensen*, 244 U. S. 216, 37 S. Ct. 529.

All our United States courts have consistently held that it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law or affect rights thus created.

In *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402, 405-6:

> "Since it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. ed. 834), we must look to the decisions of the Federal Courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal Courts."

This rule was adopted in *McFall* v. *Compagnie Maritime* Belge, 304 N. Y. 314,

In *Pope and Talbot Inc.* v. *Hawn*, 346 U. S. 406, 409-410, 74 S. Ct. 202, the Court stated:

> "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."

In *Frame* v. *City of New York*, 34 Fed. Supp. 194, defendant moved to dismiss the complaint claiming damages for personal injuries under the Jones Act and also for maintenance and cure on the ground the plaintiff had failed to file with the City of New York the notice of accident and injury, and claim for damages as required by the laws of the State of New York. This motion was summarily rejected by District Judge Bondy and in the course of his opinion he stated: "The Statutory requirements relied upon by the defendant are also inconsistent with the uniform operation of the maritime law in so far as the action for maintenance and cure is concerned." "The local rules respecting municipal liability in tort may be overridden 'by the law of the sea'."

See:

Cox v. *Roth*, 248 U. S. 207, 75 S. Ct. 242.

State legislation may not encroach upon the province of admiralty right if it contravenes essential purposes expressed by act of Congress or custom having the effect of law. Uniformity of characteristic features of general maritime law are not subject to variation of applicability in different States which would thus become prejudicial to universally recognized ancient seamen's rights.

> "(4) It is true that local legislation may not encroach upon the province of admiralty law 'if it

contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law.' Southern Pacific Co. v. Jensen, 244 U. S. 205, 216, 37 S. Ct. 524, 529, 61 L. Ed. 1086. Under this principle courts have frequently declined to enforce state statutes affecting maritime rights, Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834; Chelentis v. Luckenbach S.S. Co., 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; Union Fish Co. v. Erickson, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261; Garrett v. Moore-McCormack Co., Inc., 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239, and have also refused to apply local law governing municipalities which conflicted with the maritime law. Workman v. New York City, 179 U. S. 552, 21 S. Ct. 212, 45 L. Ed. 314; U. S. v. Port of Portland, 9 Cir., 300 F. 724; Frame v. City of New York, D. C., 34 F. Supp. 194; Petition of Highlands Nav. Corp., 2 Cir., 29 F. 2d 37."

Sorenson v. *City of New York*, 99 F. Supp. 411, 415-416, affirmed 202 F. 2d 857, cert. denied, 74 S. Ct. 674, 347 U. S. 951.

See also:

Romero v. *International Terminal Operating Co.*, 358 U. S. 354, 384; 79 S. Ct. 468, 486.

Judge Leibell, in the case of *Northern Star S.S. Co.* v. *Kansas Milling Co.*, 75 F. Supp. 534, stated as follows at page 536:

"5-6 The fact that a contract is not in writing does not bar a suit thereon in admiralty. American Hawaiian S.S. Co. v. Willfuehr, D. C. Md. 1921, 274 F. 214, affirmed United States Fidelity & Guaranty Co. v. American-Hawaiian S.S. Co., 4 Cir., 1922, 280 F. 1023. A state Statute of Frauds is inapplicable to maritime contracts. In Union Fish Company v. Erickson, 248 U. S. 308, at page 314, 39 S. Ct. 112, 113, 63 L. Ed. 261, Mr. Justice Day stated the reason for

> the rule as follows: 'If one state may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a state may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rule of the states'."

The learned Court below, while it did "assume" that the holding in *Union Fish Company* v. *Erickson*, 235 F. 385, for the Ninth Circuit, affirmed 248 U. S. 308, 39 S. Ct. 112, was still the law, then by labelling the ancient maritime obligation as "not a maritime contract, since it was merely a promise to pay money on land * * *," in effect overruled said decision and destroyed the effect thereof.

In the case of *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, the Supreme Court reiterated the fact that law applicable on actions for maintenance and cure must be liberally construed and reaffirms the views expressed by Mr. Justice Story in the case of *Harden* v. *Gordon*, 11 Fed. Cas. at pages 480, 485, No. 6,047.

The Court below was in error in drawing a distinction involving the question of a seaman's right to maintenance and cure on the basis of whether the contract was made ashore or aboard ship.

In the case of *Pope & Talbot Inc.* v. *Hawn*, *supra*, fortuitous circumstances of time and place have been held to constitute no basis for differentiation of substantive rights.

Looking back when England first granted a "patent" to the Lord High Admiral as President of the High Court of Admiralty to deal with "all causes, civil and maritime, also all contracts * * *", specific authority included matters "in, upon, or by the sea * * *" "or upon any of the shores or banks adjacent from any of the first bridges toward the sea through England and Ireland and the dominion thereof, or elsewhere beyond the seas."

Maintenance and cure, being an obligation of a maritime contract of employment, is not subject to change of substantive rights on the basis that the contract was made ashore rather than on shipboard. *Pope & Talbot Inc.* v. *Hawn, supra.*

POINT III

A seaman is entitled to the maximum benefit of treatment for illness or injury arising during employment.

The law is well settled that a seaman is entitled to maintenance and cure during his illness, at the expense of his employer until the seaman has received the maximum benefit of cure and treatment.

Aguilar v. *Standard Oil Co. of New Jersey, supra;*
Cortes v. *Baltimore Insular Line*, 287 U. S. 367, 53 S. Ct. 172;
Calmar Steamship Corp. v. *Taylor, supra;*
Farrell v. *United States, supra.*

The time proven effect of the obligation for maintenance and cure, is expressed by Judge Cardozo in *Cortes* v. *Baltimore Insular Line, supra,* in which case he defines the obligation of maintenance and cure as a maritime contractual obligation of the shipowner in the following language at page 174:

> "A remedy is his also, if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure.' The duty to make such provision is imposed by the law itself as one annexed to the employment. The Osceola, supra.* Contractual it is in the sense that it has its source in a relation which is contractual in origin, but, given the relation, no agreement is competent to abrogate the incident. If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has

The Osceola, 189 U. S. 158, 23 S. Ct. 483.

his right of action for the injury thus done to him; the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. The Iroquois, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955."

POINT IV

The obligation to provide maintenance and cure is the shipowners, until the seaman has received the maximum benefit, not only of hospitalization, but also post-hospital treatment and nursing care.

That the Public Health Service, during said time, has the public duty to treat seamen in nowise absolves or lessens the shipowner of its own continuing duty.

It is true that lower Courts have held that the mere tendering of a hospital certificate to a seaman constitutes full performance of the vessel's obligation regarding cure. *June* v. *Pan-American Petroleum & Transport Co.*, 25 F. 2d 457.

This is in conflict with the holding by the Supreme Court that the duty to provide a seaman with maintenance and cure is imposed by law as annexed to employment. *Cortes* v. *Baltimore Insular Lines, supra.*

The Court below was in error in holding that the obligation to provide proper and adequate treatment terminated before petitioner received the maximum benefit of treatment. Even if there were an admiralty statute similar to the New York State Statute of Frauds, such statute would not be applicable, as the service, having been assumed in part by the Public Health Service, constituted a joint obligation, limited to the extent of the hospital treatment, and did not constitute a delegation or transfer of the shipowner's obligation.

The right to maintenance is a contractual obligation between shipowner and seaman. It is a basic and integral

element of the employment contract. *Farrell* v. *United States, supra; Lindgren* v. *Shepard S.S. Co.*, 108 F. 2d 806.

The interpretation by the Court below is an erroneous application interpretation of the New York Statute of Frauds. The correct interpretation is to be found in the New York State Court decisions, such as *Bulkley* v. *Shaw*, 289 N. Y. 133, at pages 138, 139 (14a):

> "If, as between the promisor and the original debtor, the promisor is bound to pay, the debt is his own and not within the statute. 'Contrariwise if as between them the original debtor still ought to pay, the debt cannot be the promisor's own and he is undertaking to answer for the debt of another.' "

This language recognizes the distinction in the legal obligation here, namely:

> (1) Is it one that the "promisor is bound to pay" in which event it is its own obligation and not within the statute?
>
> OR
>
> (2) Is it one that the original debtor "still ought to pay" which renders the obligation not that of the promisor but one "to answer for the debt, default or miscarriage of another person"?

The fact that there is an assumption of obligation by the Public Health Service merely imposes a partial duty on the hospital similar to that imposed by law on the shipowner to the extent that the hospital renders treatment.

Realistically, it is common knowledge that our marine hospitals are overcrowded, that the doctors and nurses and other personnel of the hospitals are overburdened, that the hospitals are frequently manned by doctors seeking surgical experience, some without any prior practice or hospital training whatsoever, and that seamen, such as the petitioner, aware of these conditions, would rather have doctors of their own choosing.

It is utterly fantastic to assume that an insurance or shipowner's claim agent, seldom if ever a member of the bar, usually the intermediary to whom the seaman applies for maintenance, would ever give a seaman a written commitment regarding his claim. To hold that a seaman must obtain a written agreement under such circumstances is to shut out reality and act on mere legal jugglery, having no basis in law or justice.

The decision of the Court below, in effect, destroys personal liberty and dignity of man, in that a shipowner is vested with dictatorial powers, by means of economic pressure, to coerce a seaman to submit to surgery at the hands of doctors in whom he has no confidence and whose work he fears, irrespective of the fact that the seaman undertakes to obtain a doctor at his own expense.

In the case of *The Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, back in 1903, the Supreme Court held that an employer could not escape responsibility for any damage caused by inadequate treatment of an ill or injured seaman.

Certainly, the consequences of bad treatment is not assumed by the seaman. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 59 S. Ct. 262.

The duty to provide maintenance and cure finds its origin in ancient maritime law. It arises out of a personal indenture by which the seaman is bound to his ship and, in return, the vessel is bound to him in maintenance and cure. *Enochasson* v. *Freeport Sulphur* (1925), 7 F. 2d 674.

See also:

Sims v. *United States of America War Shipping Adm'n*, 186 F. 2d 972;
Troy, D. C. W. D. N. Y. 1902, 121 F. 901.

The seaman is not in a position of equal bargaining with the shipowner.

It is, indeed, unrealistic to require a seaman in need of surgery or medication to negotiate and wait for a written commitment from his employer, particularly where his ailment requires prompt attention.

Nothing seems more unfair, unjust and unreasonable than to deny to a seaman the right to enforce his employer's promise on the basis that it was not made in writing.

The law is well settled that one exercising coercive and oppressive acts is responsible for the consequences thereof.

The shipowner unquestionably had the original obligation to provide maintenance and cure. It failed to do so and substituted in place thereof an oral contract. It breached its oral contract.

The Court below has ruled that the shipowner may not be held responsible for the breach of its contract because:

1. It was not in writing.

2. Its obligation to provide proper and adequate cure terminated when the seaman entered a Marine Hospital.

We submit that such holding is contrary to the humanitarian, fair and just action so clearly demonstrated by the Supreme Court in the case of *Bisso* v. *Inland Waterways Corporation*, 75 S. Ct. 629, 349 U. S. 85 as to what constitutes fair bargaining.

The shipowner used economic pressure as the means whereby it destroyed petitioner's freedom of choice as to a surgeon at petitioner's own expense, by refusing to give him maintenance for living expenses unless said seaman capitulated to the wishes of the shipowner, discharge Dr. Frick whom he had retained, and enter a Marine Hospital instead.

The history of the origin, nature and purposes of marine hospitals in the United States is conclusive evidence of the fact that it was never intended that its facilities should provide a substitute for or termination of the shipowner's

obligation to provide maintenance and cure to its sick and injured crew members.

The Public Health Service is the oldest medical service agency in the United States Government and the Division of Hospitals is the oldest segment.

The original Act of 1798 creating the Marine Hospital Service was clearly intended as supplementing the rights of a seaman to treatment for his ills or injuries suffered in maritime service.

It is generally believed that the concept of such service had its origin in the British Isles following the defeat of the Spanish Armada in 1588. The British government then provided for the establishment of a hospital at Greenwich, near London, which was supported, in part, by a deduction of six pence per month from the wages of each seaman.

This service was limited to seamen of the Royal Navy, but in 1696 the benefits of such hospital treatment were made available to merchant seamen.

From 1730, when American seamen (then English subjects) sailed to and from American ports, up to our independence from England, the colonial seamen were granted the same benefits as British seamen.

The fact that the shipowner's obligations were not terminated by the establishment of these Marine Hospitals is further shown by the fact that the States, starting with Virginia and North Carolina, provided for local medical facilities, which were employed when the shipowners failed in their obligations to provide medical care for sick seamen.

On July 16, 1798, President John Adams signed an Act "For the Relief of Sick and Disabled Seamen" (1 Stat. 605), which provided that the master of each vessel pay to the collector of customs "a sum equal to 20¢ a month for each member of the crew".

If further argument were needed to establish the fact that maintenance and cure constituted part of the seaman's earnings, such proof is conclusively established by the fact that the 20¢ aforementioned was to be deducted from the wages of the seaman.

Maintenance and cure has since always been part of the seaman's wages.

Further evidence that use of the Marine Hospital Service was not a termination or substitute for the shipowner's obligation to provide maintenance and cure is the fact that the facilities were limited and, therefore, excluded seamen with chronic or incurable conditions and treated only those who could be expected to return to duty in a short period of time, not exceeding four months. This was so until the Act of March 3, 1837 (5 Stat. 187), which appropriated $175,000 for the Marine Hospital Service.

On June 29, 1870, the Marine Hospital Service ended and the Secretary of the Treasury was authorized to appoint a Supervising Surgeon to provide centralized administration as a Bureau of the Treasury Department (16 Stat. 169).

Seamen were required to contribute 40¢ a month out of their wages to avoid the deficiency appropriations which Congress had been making annually since 1841 (except for 1846 and 1854).

Another example that the shipowner was the one charged with the duty of treating the seaman is the fact that the shipowner had to pay 75¢ per diem for his foreign seamen.

Prior to 1879, the Marine Hospital was not available to all seamen, as the regulations then in effect barred employees in the fishing and whaling industries and crew members of pleasure vessels or canal boats. The seamen who were eligible were those who were given such treatment as part of their earnings, by the arrangement whereby the funds were actually paid by the shipowner who credited itself with such payments against the seaman's wages.

In 1884, the hospital tax was abolished (23 Stat. 57). From 1799 to 1884, seamen had contributed out of their wages the sum of $15,794,087.63 as against total expenditures of the Government of $19,622,371.87.

Still, treatment was not given to any seaman, without charge, except those formerly subject to the tax.

In 1902, Congress changed the name from "Marine Hospital Service" to "Public Health and Marine Hospital Service" (32 Stat. 712).

Up to 1905, the shipowner was subject to tonnage tax, but thereafter all branches of the Service were entirely financed by Congressional appropriations (33 Stat. 1217).

On March 3, 1919, Congress authorized the Secretary of the Treasury to provide free hospital services for discharged sick and disabled soldiers, sailors, and marines, Army and Navy nurses, and beneficiaries of the War Risk Insurance Bureau.

On May 1, 1922, by Executive Order, 57 Veterans' Hospitals operated by the Public Health Service were transferred to the new Bureau, but at the same time, the services were greatly extended to include the expansion of research service and other activities and the treatment of incurable diseases.

The shipowner's contractual obligation to provide prompt, adequate and proper treatment never was and still is not met by the limited Public Health Service facilities.

Proof of this fact is demonstrated in the letter from the Federal Security Administrator to the Chairman of the Committee on Interstate Foreign Commerce, outlining the need of increased efficiency and proper distribution of authority.

Public Law 410 was approved, which was a Bill by the 78th Congress "To Consolidate and Revise the Laws Relating to the Public Health Service, and for other Purposes".

Under the new law, the Office of Surgeon General, The National Institute of Health, The Bureau of State Services, and The Bureau of Medical Services and many common administrative and management functions were centralized in the Office of the Surgeon General.

The Department of Health, Education and Welfare created by Reorganization Plan I of 1953, became effective on April 11, 1953, thus abolishing the Federal Security Agency created in 1939, and transferred all functions of the Federal Security Administrator to the Secretary of Health, Education and Welfare.

In 1950, we had 24 hospitals, 18 outpatient clinics and about 100 outpatient offices. In 1959, this figure was reduced to 16 hospitals, but the outpatient clinics increased from 18 to 25, yet the utilization of Public Health Facilities were increased by extending benefits to those in active duty and retired members of the Armed Forces, their dependents and dependents of deceased members of the Armed Forces, after the Act of December 7, 1956.

According to the Division of Hospital Operation Manual, R-8, of January 12, 1960, there is a demand for more equipment, supplies, personnel time, and expert supervision far in excess to that available.

It is obvious from said report that there is a lack of medical generalists and specialists in every field of medicine.

The report further states "The quality of patient care rendered in any hospital has been found to be directly related to the ability of the professional personnel to keep abreast of technical advances."

The report is summarized as follows:

> "*Summary.* The United States Government requires that the Public Health Service Provide medical care to American Merchant Seamen and other designated

beneficiaries. To fulfill this obligation, the Division of Hospitals operates a system of 16 Hospitals. Each hospital, in addition to caring for the patient, should:

—Conduct research to produce new knowledge.

—Conduct extensive training to transmit new medical knowledge into practice.

—Organize its administrative and management functions as efficiently as possible.

Only then can the Public Health Service provide its beneficiaries with medical care of a quality equal to that available in the best non-Government facilities."

The Public Health Service is performing herculean tasks with its limited funds, facilities, personnel and doctors, but it is not adequate for all seamen who need cure and treatment.

A seaman is not on an equal bargaining basis with his employer as to the manner in which a shipowner performs his contractual obligation to provide prompt, adequate and proper medical and surgical aid and attendance.

When the shipowner selects an overworked, undermanned and inadequate facility, employing untrained or inadequately trained personnel (which is common knowledge), simple ordinary justice, as well as well established law, imposes on those having the power to direct (not subject to protest by a seaman) responsibility for the shortcomings of the facility to which the shipowner orders the seaman to attend. *Bisso* v. *Inland Waterways Corporation*, 349 U. S. 85, 75 S. Ct. 629.

Public Health Service Hospitals, formerly called U. S. Marine Hospitals, are owned and operated by the Federal Government. They are fully supported by direct appropriations from Congress. The purposes for which these funds are provided are specified in the language of the annual Appropriation Act ("Hospitals and Medical Care") and in Sections 321 and 322 of the Public Health Service Act, as amended (P. L. 410, 78th Congress—42 U. S. C. 248,

249). The Public Health Service Hospitals are staffed by full time Public Health Service civilian and commissioned personnel. Each hospital is in the charge of a "Medical Officer in Charge" who takes full responsibility for administering his facility within the funds allocated to him and within the framework of law, regulation, and policy of the Federal Government.

POINT V

The Court below erroneously gave consideration to comment by the District Court as to irrelevant matter, not justified by the facts.

The Court below stated (p. 21—Record):

> "As the district judge observed, these allegations were bottomed 'on contract and not on unseaworthiness or the Jones Act'; that this was not an oversight by the plaintiff 'but rather a stratagem to resuscitate a claim time barred under the Jones Act'."

There is no basis for the charge that a stratagem was practiced.

It is true that petitioner waited more than two years before retaining Jacob Rassner as his attorney, and that no direct action could have been maintained against the United States of America based on the Federal Tort Claims Act, having a two year statute of limitations (28 U. S. C. 2401).

There was no unseaworthiness involved and no negligence as contemplated by the provisions of the Jones Act, and therefore no reason for petitioner or his attorney to consider questions of the Jones Act or unseaworthiness, nor for any court to comment thereon as having any part in the consideration of the action.

The action against the employer from its inception was predicated on petitioner's claim as a matter of contractual right for maintenance and cure.

As stated by Judge Medina in the case of *Bartholomew v. Universe Tankships, Inc.*, 279 F. 2d 911:

> "It has long been settled that a seaman is not required to elect between a claim for maintenance and cure and a claim for negligence under the Jones Act. On the contrary, the Supreme Court has held the two rights are 'consistent and cumulative.' Pacific S.S. Co. v. Peterson, 1928, 278 U. S. 130, 49 S. Ct. 75, 77, 73 L. Ed. 220."

The claim predicated on the obligation of maintenance and cure is separate and apart from any claim for negligence or unseaworthiness.

The Supreme Court of the United States in the case of *Braen v. Pfeifer Oil Transportation Co.*, 80 S. Ct. 247, stated at page 250:

> "These two cases * were not brought under the Jones Act but involved maintenance and cure. Yet they make clear that the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships."

Conclusion

1. The obligation to provide maintenance and cure has always been and still is a non-delegable duty on the part of the shipowner, and therefore, even if there were a federal law similar to the New York Statute of Frauds, such Statute would be irrelevant and not applicable, by reason of the relationship and direct obligation of the shipowner to the seaman.

2. Maintenance and cure, including complete and proper medical care, always has been and still is a contractual ob-

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* *Aguilar v. Standard Oil Co., supra.*
Warren v. United States, 340 U. S. 523, 529, 71 S. Ct. 432, 436.

ligation cognizable in admiralty, and is the very essence of maritime law.

3. State law is not competent to alter, limit or abolish substantive rights of seamen to maintenance and cure.

4. The non-delegable duty of a shipowner to provide maintenance and cure is not met by the mere expediency of handing a seaman in need of treatment a "Master's Certificate."

5. A shipowner should not have the right, over the protest of a seaman, to direct a sick or injured seaman to submit his person to surgical or medical treatment at the hands of people in whom he has no confidence, particularly where he has justifiable apprehension of harm based on prior personal experiences. The adequacy of a marine hospital's facilities to treat any seaman presents an issue of fact.

6. A shipowner, having the power of direction as to the mode and manner of treatment, upon exercising such right of decision, in justice and fairness, should be charged with the consequences of its decision and direction.

7. A shipowner who disregards well known facts which are common knowledge, that Marine Hospitals lack adequate and sufficient facilities by reason of their overcrowded and undermanned conditions, and turns a deaf ear to the protests of a seaman voicing prior injurious personal experiences, and directs said seaman to discharge his own physician whom he has retained and submit to a facility so as to save the shipowner expense of treatment, on the promise to indemnify, certainly should not be permitted to escape the effects of disastrous results caused by the negligent acts which reduced the petitioner to his unfortunate plight.

8. Finally, under all of the facts in this matter, seamen generally should not be burdened with the consequences of ill effects, resulting under circumstances where the seaman, without choice, is compelled to and does obey the orders of his employer.

Respectfully submitted,

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MONTE K. RASSNER,
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on the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1960

No. 96

JOHN M. KOSSICK,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BRIEF FOR RESPONDENT

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JOHN J. CROWLEY
FRANK I. FALLON
On the Brief

New York, N. Y.
November 18, 1960

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BRIEF FOR RESPONDENT

Facts and Proceedings Below

Petitioner's presentation is incomplete and misleading. The allegations upon which he bases his claim are that, in 1949, while employed on respondent's vessel as Chief Steward, he became ill; in August 1950, upon his being discharged from the vessel, respondent offered him a master's certificate to go to the United States Public Health Service Hospital for treatment; he preferred to continue treatment with his private physician and told respondent that he would pay the doctor's bills if respondent would pay maintenance; respondent told petitioner that it would not pay him maintenance unless he went to the Public Health Service Hospital; petitioner agreed to go there for his treatment and respondent orally agreed to pay him for any injuries resulting from said treatment [respondent denies any such agreement]; following his admission to the Public Health Hospital on August 28, 1950 he was seriously burned and thereby became disabled. For these injuries he claims damages of $250,000 (R. 2-6, 16-19).

There is no claim of negligence or unseaworthiness as to the cause of petitioner's illness and any claim of such was expressly waived (R. 19).

Respondent moved to dismiss the cause of action for damages for injuries inflicted upon petitioner by the Public Health Service on the ground that it is unenforceable by reason of the Statute of Frauds. Bicks, *D.J.*, noted that:

> "• • • the first count is bottomed on contract and not on unseaworthiness or the Jones Act. This is not an oversight but rather a strategem to resuscitate a claim time barred under the Jones Act. • • • The amended complaint also contains a count for maintenance and cure. The sufficiency of that count is not questioned upon the instant application" (R. 8).

In a scholarly opinion the Court held that inasmuch as respondent's alleged oral promise was to answer for the debt, default, or miscarriage of another, the Public Health Service, it was unenforceable by reason of the New York Statute of Frauds (R. 7-14). *Kossick* v. *United Fruit Company*, 166 F. Supp. 571.

Following this decision petitioner discontinued, without prejudice, his second alleged cause of action, for "the expenses of his maintenance and cure" (R. 6, 14).

On appeal petitioner did not seriously dispute Judge Bicks' view as to the effect of the Statute of Frauds but made for the first time the argument that respondent's alleged promise was a maritime contract and that to allow it to be affected by the New York Statute of Frauds would work an irreparable injury to the uniformity of the admiralty law. The Court of Appeals, Magruder, Medina and Friendly, *C.JJ.*, had no difficulty in seeing that the alleged contract is not maritime, saying:

> "The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment" (R. 22).

The decision is reported. *Kossick* v. *United Fruit Company*, 275 F. 2d 500.

Questions Presented

The questions proffered by petitioner (pp. 1-2) are not involved at all. The complaint alleged two causes of action. The second, for the expense of maintenance and cure, has been discontinued, without prejudice. The first, for damages for the injuries caused by the Public Health Service, has been dismissed on one ground only, *viz.*, it is based upon an alleged oral agreement to answer for the debt, default of miscarriage of another, and therefore is not enforceable because of the Statute of Frauds. The Courts below made none of the bizarre holdings attributed to them by petitioner, e.g., that a seaman's right to the expenses of his maintenance and cure is not a maritime right (brief, pp. 3, 8); that respondent's obligation to pay the expenses of petitioner's maintenance and cure terminated when he entered the Public Health Hospital and did not continue until he had received the maximum benefit of treatment (brief, pp. 10, 13). The Courts below held none of these things. They held only one thing, and only one question is presented by the record here, *viz.*:

Is an alleged oral promise by a shipowner to pay damages for injuries that a seaman may sustain while being treated at a Public Health Service Hospital enforceable despite the Statute of Frauds?

Summary of Argument

I. Respondent's alleged oral promise to answer for the negligence of the Public Health Service was, as the Courts below held, "a special promise to answer for the debt, default or miscarriage of another person," and unenforceable by reason of the New York Statute of Frauds.

II. This alleged promise was, as the Court of Appeals correctly held, a promise made on land, to pay money on land, if petitioner should suffer injury, on land, in the course of medical treatment, on land, and was not maritime in nature.

III. The uniformity doctrine fathered by *Southern Pacific Co.* v. *Jensen* has lost much of its initial vigor and the states are permitted wide latitude in the maritime field. Even if the contract here alleged were maritime, uniformity would not be impaired by applying the statute of frauds because all fifty states have the statute or its substantial equivalent.

IV. The shipowner's duty to provide maintenance and cure does not require payment of damages for injuries or illness, or conscious pain and suffering, and the shipowner is not liable for injuries inflicted in the course of treatment by a recognized public institution such as the United States Public Health Service hospital.

I.

Both courts correctly applied the Statute of Frauds.

The basis of the decisions below was that the primary obligation to pay petitioner the damages he seeks is that of the Public Health Service whose negligence caused the injuries, and that respondent's alleged promise was, therefore, plainly one to answer for the debt, default or miscarriage of another. As Judge Bicks said:

> "The primary obligation to which this undertaking related, was the duty of the hospital and its employees, to exercise due care in treating plaintiff" (R. 10).

We cannot improve upon Judge Bicks' studious and thoroughly supported analysis (R. 9-13). He considered *Bulkley* v. *Shaw*, 289 N. Y. 133, which petitioner cites (brief, p. 11). But petitioner loses his way, transposing the terms "promisor" and the "original debtor." As Judge Bicks said:

> "Plaintiff characterizes the defendant's alleged undertaking as an 'original' promise and from that premise proceeds to argue that it is out of the statute. The use of the terms 'original' and 'collateral' is not very helpful because they are not clearly defined . . . .
>
> "Where the promisor comes under an independent duty of payment irrespective of the liability of the principal debtor and the undertaking is founded on a new consideration moving to the promisor and beneficial to him, the undertaking is said to be 'original,' whereas if it is to answer for the debt, default or miscarriage, of another it is characterized as 'collateral.'" (R. 10-11).

It is essential to bear in mind that the alleged promise upon which petitioner bases his claim is not a promise to pay maintenance and cure but a promise to pay compensatory damages if the Public Health Service should hurt him. The distinction is vital to a correct understanding and petitioner consistently confuses the two. Bearing in mind that the claim is based on a promise to pay damages if the Public Health Service should hurt him, plainly respondent's alleged promise is collateral to the original duty of the Public Health Service to pay petitioner damages for injuries inflicted by its negligence. Judge Bicks rightly concluded:

> "The New York Statute of Frauds precludes enforcement of the defendant's alleged oral promise. The issuance of the master's certificate to plaintiff and his use thereof to gain admittance to and utilize the facilities of the marine hospital did not constitute the shipowner an indemnitor against malpractice by or at that institution" (R. 13).

In the Court of Appeals, petitioner substantially abandoned this point. His entire brief concerning it consisted of the following words: "The Statute of Frauds has no applicability to the case at Bar." The Court of Appeals said:

> "The basis of federal jurisdiction being alleged to depend on diversity of citizenship, the district judge thought that the contract sued on had to be governed, as respects its validity, by the New York Statute of Frauds, which provided in N. Y. Personal Property Law §31(2) that every agreement is void, unless it is contained in a memorandum signed by the party to be charged, if such agreement '[i] s. a special promise to

answer for the debt, default or miscarriage of another person' " (R. 21).

The Court then considered the principal point urged by petitioner, *viz.* that a maritime contract cannot be nullified by a State Statute of Frauds because to do so would destroy the uniformity of the maritime law. We now turn to this point.

II.

The alleged contract in suit is not maritime.

No one doubts that the shipowner's duty to pay the expenses of maintenance and cure is maritime, but petftioner evades the issue. His claim is not based upon any alleged failure to provide maintenance and cure. The District Court held that "when defendant tendered plaintiff a master's certificate (which plaintiff accepted and used) its obligation to furnish cure was discharged" (R. 12), and petitioner has discontinued, albeit without prejudice, his alleged cause of action for failure to provide him "with the expenses of his maintenance and cure" in the amount of $30,000 (R. 6, 14).

As the Court of Appeals said, the contract here

> " . . . was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment" (R. 22).

It remains to consider whether such a contract is maritime. The Court of Appeals held that it is not (R. 22).

In *People's Ferry Company of Boston* v. *Beers*, 20 How. 393, this Court said:

> "The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching the rights and duties appertaining to commerce and navigation" (p. 401).

In *Insurance Company* v. *Dunham*, 11 Wall 1, this Court said that

> "And whether [the contract be] maritime or not maritime depended, not on the place where the contract was made, but on the *subject-matter* of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court" (p. 29).

This Court's application of the rule in those two cases highlights the distinction. In the former it held that "The contract is simply for building the hull of a ship, and delivering it on the water" (p. 401); hence not maritime. In the latter it held that a contract of marine insurance is maritime because

> "* * * if we carefully analyze the contract of insurance we shall find that, in effect, it is a contract, or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties, to the port of its destination; and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained" (p. 30).

Respondent's alleged agreement, however, was not a guarantee that petitioner would "pass safely over the sea," etc.; it guaranteed nothing maritime whatsoever, but only that physicians, ashore, would treat petitioner, ashore, with due care.

Numerous subsequent cases apply the rule and the distinction expressed in *People's Ferry* and in *Insurance Company. North Pacific SS Co.* v. *Hall Bros.*, 249 U. S. 119; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469; *Pacific Surety Co.* v. *Leatham*, 151 Fed. 440 (7 Cir.); *Eadie* v. *North Pacific SS Co.*, 217 Fed. 662; *Berwind-White Coal Co.* v. *City of New York*, 135 F. 2d 443 (2 Cir.).

Pacific Surety Co. v. *Leatham*, 151 Fed. 440 (7 Cir.), is in point. There Pacific agreed to pay any damage sustained from its principal's breach of a maritime charter and the question was whether such an indemnity agreement was maritime in nature. The Court held it was not, saying,

> "The direct subject matter of the suit is the covenant to pay such damages, which neither involves maritime service nor maritime transactions, and we are of opinion that the mere fact that the event and measure of liability are referable to a charter party does not make the bond a maritime contract nor make its obligation maritime in the jurisdictional sense" (p. 443).

In *Cie Francaise de Navigation A Vapeur* v. *Bonnasse*, 19 F. 2d 777 (2 Cir.), Bonnasse gave a general average bond but resisted suit against it on the bond on the ground that its agreement was not maritime. The Court held that it was maritime and the reasons given, as in *Insurance Company* v. *Dunham*, demonstrate why respondent's alleged agreement here was not maritime. Bonnasse's bond was given to release the cargo from a maritime obligation, i.e. to pay general average, and this Court held that Bonnasse's bond was maritime because Bonnasse thereby assumed the maritime obligation of the cargo to pay general average. The Court distinguished *Pacific Surety Co.* v. *Leatham, supra*, and like cases, saying,

"Jurisdiction is refused in such cases on the ground that the surety has not agreed to perform the principal's maritime obligation, but merely to pay a sum of money in case of his default" (p. 778).

So here; respondent's alleged promise is not to do anything, but merely to pay money if the Public Health Service should injure petitioner in breach of its non-maritime duty to use due care.

Four other cases where the Courts have considered matters peripheral to affairs truly maritime are apposite. *Clinton* v. *Int'l Org. of Masters,* 254 F. 2d 370 (9 Cir.) was an action by a seaman against his union to recover damages for an alleged failure to allot jobs fairly. The jobs were seamen's, hence maritime. However, the Court held that the claim for failure to allot maritime jobs fairly was not maritime, quoting from *Benedict on Admiralty*:

"It is believed that a sure guide, in matters of contract, is to be found in the relation which the cause of action has to a ship, the great agent of maritime enterprise, and to the sea as a highway of commerce."

As to the contract sued on, the Court said:

"• • • It is, in short, a labor contract, entered into upon the land, to be performed upon the land, and breached, if at all, upon the land" (p. 372).

In *Goumas* v. *K. Karras and Son,* 140 F. 2d 157 (2 Cir.), libellant claimed he had been hired by respondent to provide a crew for respondent's vessel; that he had done so and sent the men to Montreal; that the vessel was in such unseaworthy condition that the men refused to serve and the libellant had suffered considerable expense and damage by reason of respondent's breach of his agreement. The

Court dismissed the libel on the ground that the contract, on one hand to procure a crew and on the other to provide a seaworthy vessel, was not maritime in nature.

In *Mulvaney* v. *Dalzell Towing Co.*, 90 F. Supp. 259, petitioner's attorney ingeniously attempted to circumvent the Statute of Limitations by alleging a contract to settle a claim for a maritime tort so that the suit might be brought on the alleged contract to settle, after the lapse of the period for tort suits. The Court refused to be led astray and held that such a contract was not maritime.

In *Black Sea State SS. Line* v. *Association of Int. Tr. Dist.*, 95 F. Supp. 180, S. D. N. Y., libellant chartered its ship to Association effective upon libellant's receiving Moskowitz's letter guaranteeing payment of any demurrage charges. Association, without notice, cancelled the charter and libellant brought suit. Moskowitz denied that its guarantee was maritime and the Court sustained that position on the ground that Moskowitz's agreement did not undertake to do anything maritime but "merely agreed to make good any breach of the charter in this respect by the Association" (p. 182).

Petitioner cites *Union Fish Company* v. *Erickson*, 248 U. S. 308. But that contract was indisputably maritime, i.e. it was a contract for service as master of a vessel.

III.

The Statute of Frauds works no prejudice to the uniformity of the general maritime law.

The Courts below did not apply the Statute of Frauds to seamen's articles, or to the owner's duty to provide maintenance and cure, or to any familiar or characteristic feature of the maritime law. It was applied only to an alleged oral contract to pay damages for a doctor's possible malpractice, a special agreement not claimed to be customary and in fact unique. Nevertheless petitioner claims (brief, p. 5) that the decision below causes the Statute to impair some characteristic feature of the general maritime law. But he does not say what that feature is. There is no general maritime law as to the effect of oral contracts, such as the one in question. The application of the Statute of Frauds here, therefore, cannot contravene any precept of maritime law. Particularly it can not be said to destroy uniformity because every one of our 50 States has the same, or similar, statute requiring that agreements to answer for the debt or default of another must be in writing—see Appendix, *infra*, pp. 41, 42.

In *The Tungus* v. *Skovgaard*, 358 U. S. 588, this Court said that *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, "fathered" the "uniformity" concept (p. 594). In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, this Court said:

> "And plainly, we think, no such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony or uniformity of that law in its international and interstate relations" (p. 216).

Since there is no maritime law as to whether such contracts as the one alleged here must be in writing, the Statute of Frauds does not prejudice any feature of the general maritime law. It does not interfere with proper harmony or uniformity because every one of the 50 states has the same or a similar statute.

In *Standard Dredging Corporation* v. *Murphy*, 319 U. S. 306, Mr. Justice Black said for a unanimous court that "the Jensen case had been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws" (p. 309). Since *Southern Pacific* v. *Jensen* this Court has refused to strike down State statutes as contravening the uniformity principle in many cases which come far closer to the borderline than this one.

In *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440, petitioner's vessels, operated on the Great Lakes, were subject to boiler inspection pursuant to Federal law and the regulations of the Coast Guard. Although they complied with all Federal laws and regulations in respect of their boilers, this Court held that a Detroit ordinance intended to control the amount of smoke emitted from the ships was applicable, valid and must be obeyed even though structural changes to the vessels would be required.

Similarly, in *Kelly* v. *Washington*, 302 U. S. 1, this Court held that a State statute requiring that certain vessels be submitted to the inspection of State inspectors was applicable and valid as applied to motor-driven tugs despite the fact that Congress had, by statute, set up a complete system of vessel inspection which exempted motor-driven vessels.

In *Hess* v. *United States*, 361 U. S. 314, the decedent was drowned in the Columbia River due, as alleged, to the negligence of persons operating the Bonneville Dam in fail-

ing to close sufficient spillways to minimize the flow of water where decedent and others were working. It was held that the case was one for decision under the maritime law and the lower Courts held that there was no such negligence as would make respondent liable under Oregon's Wrongful Death Act. Petitioner, however, claimed, under the Oregon Employers' Liability Law. Although that statute imposes a considerably stricter standard of duty than that imposed by maritime law, nevertheless this Court held it applicable. What price uniformity?

The Wrongful Death Acts of the states are far from uniform and each conflicts, in a sense, with the general maritime law because that law confers no right of action for wrongful death. Yet in *Hess* and in many other earlier decisions, this Court made it clear that it is not so important after all to maintain the maritime law uniform and unadulterated by State statutes.

In *Romero* v. *International Term. Co.*, 358 U. S. 354, this Court said:

> "It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases,

> even, at times, when they conflicted with a rule of maritime law which did not require uniformity. 'In the field of maritime contracts,' this Court has said, 'as in that of maritime torts, the National Government has left much regulatory power in the States.' Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law through our history" (p. 373-4).

Wilburn Boat Co. v. *Fireman's Ins. Co.*, 348 U. S. 310, is close to the mark. There a contract of marine insurance made in Texas contained a "warranty" of a type declared void by a Texas statute. The vessel was destroyed by fire. Another Texas statute provided that no breach of the provisions of a fire policy could be a defense unless the breach contributed to the loss—and it was clear that the breach claimed by the insurance company could not have contributed. This Court recognized that the insurance contract was maritime but held that the Texas statutes controlled and rendered the policy warranty invalid as a defense.

In *Just* v. *Chambers*, 312 U. S. 383, although according to maritime law the personal liability of a tort feasor does not survive his death, this Court applied the Florida Survival Statute to maritime causes of action for personal injuries. This Court stated that:

> "* * * the criterion applied in determining the validity and effect of the state legislation * * * is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction" (p. 391).

In *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109, despite the Federal Judicial Code provision vesting District Courts with exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, this Court held valid a New York statute conferring upon its Courts jurisdiction to require specific performance of an agreement to arbitrate charter disputes contained in a maritime charter party and found no difficulty in distinguishing the uniformity doctrine of *Southern Pacific Co.* v. *Jensen* (pp. 124-5).

In *Jarka Corporation* v. *Hellenic Lines*, 182 F. 2d 916 (2 Cir.), a "firm" offer was made to do certain stevedoring work, i.e., maritime work. There was no consideration for the offer and its validity was therefore contested. However, the New York Personal Property Law, c. 41, §33(5), provides that "firm" offers shall be valid although given without consideration. The Court considered whether the *Southern Pacific Co.* v. *Jensen* doctrine of uniformity would be violated if the New York statute were applied and held that it would not and said:

> "In the famous case of Southern Pac. Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, and its progeny, the Supreme Court, over strong dissent, called attention to the necessit of uniformity in certain aspects of maritime law, and invalidated several state workmen's compensation acts which were said to interfere with that essential uniformity. In United States Nav. Co. v. Black Diamond Lines, 2 Cir., 124 F. 2d 508, certiorari denied Black Diamond Lines v. U. S. Nav. Co., 315 U. S. 816, 62 S. Ct. 805, 86 L. Ed. 1214, we left open the effect which the Jensen rule might have on the applicability of §33 of the N. Y. Personal Property Law to maritime contracts, though Judge L. Hand, dis-

senting, was already prepared to hold it applicable. But subsequent Supreme Court opinions made it clear that the present Court would apply the Jensen rule—and overlook state law—only with great reluctance. See Parker v. Motor Boat Sales, 314 U. S. 244, 247, 248, 62 S. Ct. 221, 86 L. Ed. 184; Davis v. Department of Labor and Industries of Washington, 317 U. S. 249, 252-256, 63 S. Ct. 225, 87 L. Ed. 246. Finally, in Standard Dredging Corp. v. Murphy, 319 U. S. 306, 309, 63 S. Ct. 1067, 1068, 87 L. Ed. 1416, Justice Black, speaking for a unanimous Court, said: 'Indeed, the Jensen case has already been severly limited, and has no vitality beyond th[illegible] which may continue as to state workmen's com[illegible]sation laws.' This is only a dictum, to be sure, but it is a dictum strongly stated, and already accepted as authoritative by this court in Guerrini v. United States, 2 Cir., 167 F. 2d 352, 355, certiorari denied 335 U. S. 843, 69 S. Ct. 65, 93 L. Ed. 393. We think that even in its greatest ascendancy the Jensen rule would not have prevented application of such a state statute as this, which regulates a matter in which uniformity is not necessary and which is not 'in conflict with any essential feature of the general maritime law.' Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 125, 44 S. Ct. 274, 277, 68 L. Ed. 582. In view of the latest Supreme Court pronouncements, we should certainly not extend the Jensen rule at this late date to a field in which it has not hitherto been applied. Thus we hold that the N. Y. Personal Property Law §33(5) is applicable here and hence that the offer of November, 1947, even though without consideration, bound plaintiff until thirty days after it had given notice of termination" (p. 919).

Petitioner's Authorities Distinguished.

We have no quarrel with the doctrine represented by petitioner's authorities (brief, pp. 5-8) but they do not touch the point involved here. We have referred to *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, supra, pp. 12-13.

Riley v. *Agwilines, Inc.*, 296 N. Y. 402, represents only the familiar doctrine that negligence causing death on a vessel afloat in the navigable waters of a state gives rise to a maritime cause of action under the applicable state death act. *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, only applies the same doctrine to personal injuries so sustained.

Pope & Talbot, Inc. v. *Hawn*, 346 U. S. 406 refused to apply to a maritime tort occurring in Pennsylvania the common law contributory negligence rule of Pennsylvania which would bar recovery completely. The reason, of course, was that this would destroy a basic characteristic of the maritime law that contributory negligence is not a bar but only goes to diminish recovery.

Cox v. *Roth*, 348 U. S. 207 and *Frame* v. *City of New York*, 34 F. Supp. 194, merely held that the 3-year statute of limitations period in the Jones Act may not be diminished by state statute or municipal ordinance.

Sorensen v. *City of New York*, 99 F. Supp. 411, affirmed 202 F. 2d 857 (2 Cir.), certiorari denied 347 U. S. 951, holds merely that a seaman's right to sue for wages is controlled by Federal statutes relating to seamen rather than by State or Municipal law.

Why petitioner cites *Romero* v. *International Term. Co.*, 358 U. S. 354, we do not know. At p. 384, to which petitioner refers, this Court holds only that neither the Jones Act nor the general maritime law of the United States is

applicable to the claim of a Spanish seaman against the Spanish owner of a Spanish ship on which he was employed.

Northern Star SS Co. v. *Kansas Milling Co.*, 75 F. Supp. 534, holds no more than *Union Fish Company* v. *Erickson*, 248 U. S. 308. In that case Erickson alleged that he had orally contracted in California to proceed to Alaska and there serve for a year as master of Union Fish Company's vessel. He alleged that he proceeded to Alaska and performed his duties under the contract until he was wrongfully discharged, and he sued for damages for breach of contract. The vessel owner claimed that the oral contract was invalid by reason of the California Statute of Frauds. This Court held that the contract was maritime and considered that the question was "can such engagement be nullified by the local laws of a State, where the contract happens to be entered into, so as to prevent its enforcement in an admiralty court of the United States?" (p. 312). This Court answered in the negative, saying:

> "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made" (p. 313).

This Court's comments, just quoted, distinguish that case completely from this.

In *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109, this Court said, concerning the statute involved in *Union Fish Co.* v. *Erickson*:

"It was held invalid, because, as construed and applied, it attempted to modify the remedial law of the admiralty courts" (p. 124-5).

In both *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 at 241 and *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469 at 477, this Court, despite *Union Fish Co.* v. *Erickson*, affirmed "the power of a State to make some modifications or supplements" of and to the general maritime law (257 U. S. at 241), and that the general maritime law may be "modified or supplemented by State statutes" if they "work no material prejudice to the general maritime law" (257 U. S. at 477).

Judge Hough, a preeminent admiralty judge, writing of Admiralty Jurisdiction—Of Late Years, XXXVII Harvard Law Review 529, said:

> "A somewhat similar failure to stress force of custom, in maritime matters, is found in *Union Fish Co.* v. *Erickson*, where with obvious correctness the California statute of frauds was not permitted to defeat a shipmaster's libel for wrongful discharge from an engagement for more than one year. But the ground of decision should have been the simple one that such engagements, orally made, were as old as the history of marine customs, had passed into the maritime law of the United States, and would be recognized and enforced by the courts of the nation,—so that what California said on the subject (if anything) was merely immaterial" (p. 537).

Of course no custom is involved here—the agreement alleged by the petitioner is unique.

In *The Law of Admiralty*, Gilmore and Black compare *Union Fish Co.* v. *Erickson* and *Western Fuel* v. *Garcia* and say:

"As to the distinction between state statutes of frauds and state statutes of limitation, the layman who lacks the special insight of justices of the Supreme Court can only say: *Credo quia absurdum est*" (p. 536).

In *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, petitioner, a seaman, was injured while working on respondent's ship and sued for damages. Respondent claimed that a release had extinguished the claim. The jury gave Garrett a verdict but the Court set it aside because he had failed to sustain the burden of proof required under Pennsylvania law to invalidate a release. This Court held only that the law applicable in respect of seamen's releases of maritime claims was Federal, not State.

Statutes of Frauds were long ago conceived as a necessary restraint on a very human tendency to resort to a little "larceny" on occasion to support claims. Seamen have not been noteworthy for any lack of such tendency. To hold Statutes of Frauds inapplicable to such agreements as the one alleged here would expose a shipping industry already sorely beset to a new class of claims in addition to its existing, extreme obligations for Jones Act negligence and for unseaworthiness to the further detriment of a Merchant Marine in fierce competition with foreign flag vessels which do not coddle seamen.

IV.

Respondent is not liable for the consequences of negligent treatment by the Public Health Service.

This is not the case of a seaman left ill and destitute abroad; nor is it a case where the illness was caused by any negligence of respondent or unseaworthiness of its vessel, or even a consequence of his service on the vessel. Respondent gave petitioner a "master's certificate" entitling him to treatment at the Public Health Service hospital and petitioner accepted it and used it. He was fully aware of his rights. In his answers to interrogatories he said:

> "At that time, plaintiff was well aware that the usual duties of a steamship owner or operator were satisfied upon the furnishing of a captain's certificate to a United States Public Health Service hospital • • • " (R. 18).

It is well settled that the shipowner complies with his duty to provide "cure" when he gives the seaman a master's certificate entitling him to treatment at a Public Health Service hospital. The leading case is *The Bouker No. 2*, 241 Fed. 831, certiorari denied 245 U. S. 647. In *Calmar SS Corp.* v. *Taylor*, 303 U. S. 525, this Court cited *The Bouker* and said:

> "Moreover, Courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service" (p. 531).

The Court of Appeals for the Second Circuit has held the same in subsequent cases. *Wilson* v. *United States*, 229

F. 2d 277, 281; *Muruaga* v. *United States*, 172 F. 2d 318; *Bailey* v. *City of New York*, 153 F. 2d 427; *McManus* v. *Marine Transport Lines*, 149 F. 2d 969, certiorari denied 326 U. S. 773; *The Saguache*, 112 F. 2d 482.

The Court of Appeals for the Ninth Circuit follows the same rule. *United States* v. *Loyola*, 161 F. 2d 126; *United States* v. *Johnson*, 160 F. 2d 789; *Van Camp Seafood Co.* v. *Nordyke*, 140 F. 2d 902.

District Court decisions are numerous and the text-writers agree. *Zackey* v. *American Export Lines*, 152 F. Supp. 712 (D. C. N. Y., 1957); *Benton* v. *United Towing Co.*, 120 F. Supp. 638 (D. C. Cal., 1954); *The Alpha*, 44 F. Supp. 809 (D. C. Pa., 1942); *The Law of Seamen* by Norris, pp. 216-17, 221-2; *The Law of Admiralty* by Gilmore and Black, p. 266; *Robinson on Admiralty*, p. 295.

There is no question here of tort-feasor liability to the injured man for the consequences of treatment which a tort caused the man to undergo. Respondent's duty to provide cure arose solely by virtue of its status as petitioner's employer and not because of any wrong. The books can be searched in vain for a case holding a shipowner liable for the consequences of the negligence of a doctor administering "cure," except in the rare case where the doctor was not qualified and the shipowner had reason to know it. That is not the situation here. While the complaint alleges that petitioner held the Public Health Service in low regard, it does not allege that the Public Health Service doctor who treated petitioner and who injured him was incompetent or unqualified, or that respondent had any reason to know that petitioner would not be treated with due care and successfully.

A review of the leading cases on maintenance and cure make the following precepts clear.

1. When a seaman falls ill or is injured in the service of the ship, the shipowner must (with certain exceptions not present here) arrange for the seaman to receive proper medical care and bear such expense as may be involved.

2. In like circumstances the shipowner must provide maintenance for the seaman, i.e. the cost of room and board during the period of "cure" and until the seaman has made as much recovery as is possible.

3. The United States Public Health Service hospitals are open to seamen, gratis, and the shipowner who gives the seaman a master's certificate entitling him to such treatment and, where such is necessary, provides reasonable means for the seaman to get there, has done his full duty as concerns providing "cure."

4. Where there is no negligence on its part or unseaworthiness of its vessel, the shipowner is not liable to the seaman for compensatory damages for his illness or injuries or for any permanent disability or for conscious pain and suffering.

5. Where the shipowner sends the seaman to a private physician rather than to the Public Health Service for treatment, and uses due care in selecting a duly licensed and apparently competent one, it is not liable to the seaman for the consequences of any negligence or malpractice of the doctor. See particularly: *The Sarnia*, 147 Fed. 106 (2 Cir. 1906), *infra*, pp. 27, 28); *The C. S. Holmes*, 209 Fed. 970 (W. D. Wash. 1913), reversed on other grounds, 237 Fed. 785 (9 Cir. 1916, *infra*, pp. 28, 29); *Bonam* v. *Southern Menhaden Corp.*, 284 Fed. 360 (S. D. Fla. 1922, *infra*, p. 30); *Williams* v. *United States*, 133 F. Supp. 319 (E. D. Va. 1955), affirmed 228 F. 2d 129 (4 Cir. 1955, *infra*, pp. 34, 35).

In *Harden* v. *Gordon*, 2 Mason 541, Fed. Cas. No. 6047 (1823), Harden, mate on Gordon's vessel, sought to recover his expenses occasioned by an illness in a foreign port. Mr. Justice Story considered the origin and development of "maintenance and cure." He held that "the maritime law does provide, that the expenses of sick seamen shall be borne by the ship" and that the claim for the expenses of maintenance and cure "constitutes, in contemplation of law, a part of the contract for wages, and is a material ingredient in the compensation for the labour and services of the seamen" (pp. 481, 482).

In *Reed* v. *Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641 (1832), Mr. Justice Story, dealing with another claim for the expenses of maintenance and cure, found the principles to be as follows:

> "* * * * a seaman, who is taken sick, or is injured, or disabled, in the service of the ship, without any fault on his own part, is by the martime law entitled to be healed at the expense of the ship" (p. 427).
>
> "The voyage of the ship must, so far as the seamen are concerned, be deemed to commence, when they are to perform service on board, and to terminate, when they are discharged from farther service. The title to be cured at the expense of the ship is co-extensive with the service in the ship" (p. 428).
>
> "The seaman is to be cured at the expense of the ship, of the sickness or injury sustained in the ship's service. It must be sustained by the party, while in the ship's service; and *he is not to receive any compensation, or allowance for the effects of the injury.* But so far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for, diet, lodging, nursing, or other assistance, they

are a charge on, and to be borne by, the ship. The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for *expenses* necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, *the owners* are freed from all further liability. They *are not in any just sense liable for consequential damages*" (p. 429, italics ours).

In *The Osceola*, 189 U. S. 158 (1903), the sole question was whether a vessel, in all respects seaworthy, is liable to one of the crew for injuries resulting from a negligent order of the master in respect of the navigation and management of the vessel. In reaching its decision that there was no liability, this Court considered the long prior history of the rights and liabilities of seamen and vessel owners and made certain observations pertinent here. In summing up the Rules of Oleron and the Laws of Wisbuy, this Court said:

"* * * nor does it appear that the seaman is to be indemnified beyond his wages and the expenses of his maintenance and cure" (p. 169).

This Court quoted from the British Merchants' Shipping Act the provision "* * * if the master or any seaman or apprentice receives any hurt or injury in the service of the ship to which he belongs, the expense of providing the necessary surgical and medical advice * * * shall be defrayed by the owner of such ship * * *." and then pointed out that "These provisions of the British law seem to be practically identical with the Continental Codes" (pp. 170-1).

This Court also noted that our statutes were silent on the subject of liability and that in all but a few of the

more recent cases recovery had been "limited to the wages and expenses of maintenance and cure" (p. 172).

This Court referred to *Reed* v. *Canfield, supra,* and quoted Mr. Justice Story's decision that shipowners:

> "* * * are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages" (p. 172).

In *The Iroquois,* 194 U. S. 240 (1904), the seaman was injured at sea but the master elected to continue on to destination rather than divert to a nearer port where it was reasonable to suppose that professional medical treatment was available. This Court considered it a close case but affirmed a decision below awarding damages for the master's failure to divert to the intermediate port to provide proper medical care. This is a far cry from holding a shipowner for the consequences of the malpractice of medical men provided by the shipowner and reasonably believed to be competent.

In *The Sarnia,* 147 Fed. 106 (2 Cir. 1906), the Court squarely held that the shipowner is not liable for injuries sustained due to the negligence of a doctor engaged by the shipowner to treat an injured seaman. There the seaman sustained an apparently minor injury to his hand, due to no negligence on the ship's part, as the ship was preparing to sail from New York. However, the hand was worse when the ship arrived at Kingston six days later and the master called in a shore doctor who treated the injury and advised that it was not necessary to leave the man in a hospital at Kingston. The hand was much worse when the ship reached Port Limon and the master called a competent

surgeon who treated the seaman while the ship was there and advised that it would be safe for him to remain aboard and return to New York. On the return voyage the hand worsened considerably and later became permanently crippled. The Court denied recovery on the seaman's claim that the shipowner was liable for the negligence of the shore doctors. The Court said:

> "If the doctors made some error of diagnosis, as the most competent physicians and surgeons sometimes do, and thus prescribed a treatment not sufficient to insure safe return to the United States, the fault should not be charged to those [ship's officers] who faithfully administered that treatment" (p. 109).
>
> "The doctors may each have made a serious mistake in this particular case, but certainly they were 'competent'" (p. 109).
>
> "To hold the Sarnia responsible upon the record here presented would be to extend the liability of the ship far beyond the point to which it has been carried in any reported case" (p. 110).

In *The C. S. Holmes*, 209 Fed. 970 (W. D. Wash. 1913), reversed on other grounds, 237 Fed. 785 (9 Cir. 1916), certiorari denied, 203 U. S. 588, the seaman suffered a compound fracture of the right arm and the master engaged a shore doctor to provide treatment and "cure." The seaman claimed damages for the doctor's allegedly negligent treatment. The Court held that there is no such liability where the shipowner exercises reasonable care in employing a regularly licensed physician believing him to be competent. The Court said:

> "The master is not negligent when he exercises reasonable care in selecting and employs a regularly licensed

physician, believing him to be competent, and intrusts the injured seaman to his care, in the belief that such physician will render careful and competent treatment" (p. 974).

"Where there is no negligence of the master, the physician's negligence cannot be imputed to him or to the owner, and the vessel cannot be proceeded against in rem" (p. 974).

"The owner is liable for the expense of effecting the cure of a seaman injured in his employ * * *. The liability of the owner to pay for medical treatment, and his liability to pay damages, of which medical treatment is an element, are two different things. The first liability exists from the fact of injury; the second arises only where the owner is at fault either in causing the injury or its treatment" (p. 975).

In *The Bouker No. 2*, 241 Fed. 831 (2 Cir., 1917), certiorari denied, 245 U. S. 647, a tug's engineer fell ill in the service of the tug and was treated ashore by a hospital and a surgeon of his choice. The District Court decreed recovery, for "cure," the amount of the physician's, the surgeon's and the hospital's bills. The Court of Appeals reversed and limited recovery to what cure would have cost if the engineer had gone to the marine hospital. Hough, *J.* wrote for the Court:

"Nor does the liability of the ship extend beyond—'expenses of effecting the cure by ordinary medical means. This does not include extraordinary medical treatment' or treatment after cure is effected as completely as possible in a particular case.'

* * * * *

"We take cognizance of the existence of the Marine Hospital service, where at minimum expense, or (in proper

cases) none, a seaman may be treated. It is not permissible for a person entitled to care from his ship (and equally entitled to have that care bestowed in a Marine Hospital) to deliberately refuse the hospital privilege, and then assert a lien upon his vessel for the increased expense which his whim or taste has created" (p. 835).

In *Bonam* v. *Southern Menhaden Corp.*, 284 Fed. 360 (S. D. Fla. 1922), a seaman sustained a rupture and claimed against the vessel owner for the malpractice of a shoreside physician and surgeon engaged by the vessel owner to treat him. The vessel owner demurred to this count and the Court sustained the demurrer, saying:

"The fourth count alleges negligence of the surgeon performing the operation without allegations bringing home to the defendant knowledge that the surgeon was unskilled" (p. 362).

In *Pacific Steamship Company* v. *Peterson*, 278 U. S. 130 (1928), this Court considered whether the right given to seamen by the Jones Act to recover for injuries caused by negligence was an alternative for maintenance and cure. In concluding that the seamen need not elect between those remedies but, in a proper case, could have both, this Court quoted from *Harden* v. *Gordon*, 2 Mason 541 (which it noted was cited with apparent approval in *The Oscepla*), where Mr. Justice Story said "a claim for the expenses • • • 'constitutes, in contemplation of law, a part of the contract for wages, and is a material ingredient in the compensation for the labor and services of the seamen'" (p. 137). This Court also quoted with obvious approval from *The A. Heaton*, 43 Fed. 592, Mr. Justice Gray's decision that the seamen's right to maintenance and cure, "being 'grounded solely upon the benefit which the ship derives

from his service * * * does not extend to compensation or allowance for the effects of the injury; but it is in the nature of an additional privilege, and not of a substitute for or a restriction of other rights and remedies'" (p. 137).

In *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367 (1932), Santiago contracted pneumonia on board ship and subsequently died. Suit was brought for damages for his death, claimed to have resulted from the failure of the ship's officers to give him medical care and attention while aboard the vessel, allowing him to remain in cold, unsanitary and ill-equipped quarters, providing him with insufficient and improper food, failing to seek aid from passing vessels and failing to send him to a hospital immediately upon arrival in port.* This Court affirmed, but only on the theory that a cause of action for negligence existed under the Jones Act and did not base its decision upon failure to provide maintenance and cure. Again, it is a far cry from the negligence of the ship's personnel in providing proper treatment and the negligence of Public Health Service personnel in committing acts of malpractice during treatment.

In *Calmar S.S. Corp.* v. *Taylor*, 303 U. S. 525 (1938), the seaman had fallen ill of an incurable disease while in the service of the shipowner, not due to any fault of the shipowner, and the Court below had awarded him a lump sum sufficient to defray the cost of maintenance and cure for the remainder of his life. The question before this Court was whether the shipowner's duty to provide maintenance and cure extended over so long and so indefinite a period. This Court held that it did not. In reaching its decision this Court pointed out that maintenance and cure "is not an award of compensation for the disability suffered" (p. 528), and said:

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* Swan, *C.J.* so described the basis of the cause of action. *Cortes* v. *Baltimore Insular Line*, 52 F. 2d 22 at 23.

> "The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial * * *" (p. 531).

This court also referred with approval to *The Bouker No. 2*, 241 Fed. 831, 2 Cir., supra, p. 29 and said:

> "Moreover, courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seamen through recourse to that service" (p. 531).

Socony-Vacuum Co. v. *Smith*, 305 U. S. 424 (1939), dealt only with the question whether assumption of risk is a defense to a claim for Jones Act negligence. This Court did not hold, as petitioner asserts (brief, p. 12), that the consequences of bad medical treatment are not assumed by the seaman.

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239 (1942), did not involve maintenance and cure but only who has the burden of proof in a contest concerning the validity of a seaman's release. Petitioner's assertion (brief, p. 8) that this Court reiterated the fact that the law applicable on actions for maintenance and cure must be liberally construed is erroneous. The Court's reference, p. 248, was to the Jones Act rather than the admiralty rule allowing maintenance and cure—as shown by the Court's reference to *Warner* v. *Goltra*, 293 U. S. 155 and *The Arizona* v. *Anelich*, 298 U. S. 110, which were Jones Act, not maintenance and cure cases.

In *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36 (1943), this Court considered whether Jones Act

liabilities extend to injuries sustained ashore and said that maintenance and cure is "ordinarily measured by wages and the cost of reasonable medical care" (p. 40).

In *De Zon* v. *Amer. President Lines*, 318 U. S. 660 (1943), a seaman employed aboard a passenger ship suffered injuries resulting in the loss of an eye due, as he claimed, to the negligence of the ship's doctor in treating him and failing to have him hospitalized ashore. This Court held that if the doctor were negligent the shipowner would be liable but predicated this liability solely on Jones Act provisions which make the seaman's employer liable to the seaman for the negligence of the employer's other employees.

Aguilar v. *Standard Oil Co.*, 318 U. S. 724 (1943), dealt only with the narrow question whether a seaman is entitled to maintenance and cure in respect of injuries sustained ashore while proceeding to or from the vessel. In considering the nature of "cure," this Court said:

> "Whether by traditional standards he [ship owner] is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship" (p. 730).

Farrell v. *United States*, 336 U. S. 511 (1949), dealt only with the question whether maintenance is payable after the seaman has reached the point of maximum cure and for the balance of his natural life. In considering the nature of maintenance and cure, this Court said:

> "We hold that he [the seaman] is entitled to the usual measure of maintenance and cure at the ship's expense, no less and no more, and turn to the ascertainment of its bounds" (p. 517).

The Court referred to the Shipowner's Liability Convention of 1936, 54 Stat. 1693 and quoted Article 4, ¶1, which provides:

> "The shipowner shall be liable to defray the *expense* of medical care and maintenance * * * " (p. 517, italics ours).

Although the Court considered that the need of the seaman there concerned was "great and his plight most unfortunate," it held that these considerations did not "afford a basis for distortion of the doctrine of maintenance and cure" (p. 519).

In *Williams* v. *United States*, 133 F. Supp. 319 (E. D. Va., 1955), the seaman became afflicted with a mental ailment. Upon the vessel's arrival in port the master made no provision for his treatment and he slipped ashore, where he was taken into custody and committed to the Virginia Central State Hospital. His committee brought suit for damages and maintenance and cure and the Court found that the Central State Hospital was inadequately equipped or staffed to give the seaman proper care. Nevertheless, the Court denied damages for failure to provide proper cure, although it considered that the shipowner had flagrantly abandoned the seaman, because a shipowner is not liable for malpractice unless it has reason to believe that the treating doctor or institute is not adequate. The Court said:

> "In *The C. S. Holmes*, D. C., 209 F. 970, a somewhat similar situation arose with respect to the master of a vessel sending a seaman to an incompetent physician who was, however, licensed by the State of Washington. In holding for the shipowner, the Court said that, in the absence of knowledge of the incompetency of the

physician, the master could presume that reasonable medical care would be afforded" (p. 325).

"• • • the ultimate question resolves itself to the duty, if any, of a shipowner to investigate as to the adequacy of a state-supported institution of this type. In the judgment of this Court, such a rule would impose an undue hardship on shipowners and could readily be carried to an extreme. The claim for damages for failure to provide maintenance and cure is accordingly dismissed" (pp. 326-7).

However, the Court very wisely indicated that, as regards future cure, the shipowner was then on notice of the inadequacy of the Central State Hospital and should do something about it.

The *Williams* case was affirmed, 228 F. 2d 129 (4 Cir. 1955), where the Court said:

"Once Seaman was in this State mental institution, • • • the shipowner was justified in assuming that Seaman would receive ordinary and reasonable care" (p. 133).

This Court denied certiorari, 351 U. S. 986, and petition for a rehearing, 352 U. S. 860.

In *Balancio* v. *United States*, 267 F. 2d 135 (2 Cir., 1959), plaintiff seaman, a civilian employee of the United States, claimed to have suffered injuries while a patient in a Public Health Service hospital undergoing treatment for severe head and skull injuries allegedly sustained in the course of his employment on the vessel. He was entitled to recover for the injuries sustained aboard the vessel under the Federal Employers' Compensation Act, Title 5, U. S. Code §751. The Court held that that was his exclusive remedy. It considered whether the additional injuries al-

legedly sustained due to the negligence of the Public Health Service could be considered consequential and denied recovery.

In *Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911 (2 Cir. 1960), the Court defined "maintenance" as:

> "* * * a living allowance sufficient to enable the seaman to maintain himself in a manner comparable to that which he received aboard ship. * * * Maintenance is related to out-of-pocket expenses and thus is not recoverable for periods during which the seaman receives free room and board at a Marine Hospital. *Calmar SS Corp.* v. *Taylor*, supra; *The Bouker No. 2*, 2 Cir. 1917, 241 F. 831, certiorari denied, 1917, 245 U. S. 647" (italics ours).

The Court said that "cure"

> "relates to the expense of medical treatment. The duty to provide such treatment, however, extends only until the patient reaches the point of maximum recovery. *Calmar SS Corp.* v. *Taylor*, supra, *Farrell* v. *United States*, 1949, 336 U. S. 511" (pp. 914-15, italics ours).

The Law of Admiralty by Gilmore and Black can be searched in vain for any suggestion that the shipowner must pay damages to the seaman for the consequences of malpractice committed by a Public Health Service doctor (pp. 253-71). These authors say:

> "The seaman does not have a free hand in choosing his own physician and deciding on his own treatment. The United States Public Health Service maintains Marine Hospitals at which seamen may receive low cost or free care and treatment. An ill or injured seaman who has been given a 'hospital ticket' by the master and provided with transportation to the nearest Marine

Hospital will usually be held to have acted at his own risk and expense if he either refused to enter the Marine Hospital and to follow the advice of the Public Health Service physicians or if he consults private physicians or enters another hospital" (p. 266).

The Law of Seamen, Vol. 2, by Norris, can likewise be searched in vain for any suggestion that the shipowner is liable for malpractice of the Public Health Service (pp. 123-239). Maintenance and cure is defined as:

"* * * a means of giving a seaman relief by way of affording him medical care and treatment and reimbursing him for the cost of maintaining himself during the convalescent period. It is not an award of compensation for damages for the disability which he suffered. It does not indemnify the seaman for his injury or disability and does not include damages for the pain and suffering which he may have endured" (p. 147).

"Neither the shipowner nor the vessel is an insurer of the health of the seaman and his sickness not caused by his employment, does not create any liability of the shipowner beyond that of providing maintenance and cure. This obligation is discharged when the shipowner has provided actual maintenance and cure, or its equivalent in money, up to the time when the seaman has recovered from his disability to the extent that it is reasonable to believe recovery under treatment is possible. The shipowner or vessel does not become an insurer with respect to the duty to cure the seaman for cure means care and not a positive cure which may be impossible" (pp. 179-80).

This author negatives the idea that the shipowner who sends the seaman to a doctor reasonably believed to be

licensed and competent can be liable for the doctor's mistakes. He says:

> "When the vessel is in port, the master is not negligent when he exercises reasonable care in selecting and employing a practicing physician believing him to be competent and entrusts the injured seaman to his care in the belief that such physician will render careful and competent treatment. A shoreside licensed physician may be 'competent' in so far as the vessel's liability to the seaman is concerned even though he may make a serious mistake in the diagnosis or treatment of the sick or injured seaman" (pp. 212-13).

> "When a master relies upon a shoreside doctor's advice to the effect that the seaman does not require hospitalization and can continue on the voyage, receiving medical care which the ship affords and being relieved of all duties, it has been held that the vessel was exonerated from liability although the advice was erroneous and the seaman suffered serious injury as a result" (p. 216).

Concerning the Public Health Service hospitals, the author writes:

> "It is common knowledge among shipping men and seamen that United States Marine Hospitals located at principal seaport cities in the United States are open to seafarers who require hospitalization, medical, dental or surgical treatment.
>
> "These hospitals are in large, modern, airy buildings and are generally equipped to take care of most medical and surgical cases. The hospital staffs are members of the United States Public Health Service and are government employees . . . " (pp. 216-17).

"The weight of authority is to the effect that where an offer of hospital services is made to a seaman by the master or ship's officer designated by him and the seaman refuses to avail himself of hospital treatment and care, the owner of the vessel is relieved of the obligation of payment of maintenance and cure (p. 223).

In his dissenting opinion in *De Zon* v. *Amer. President Lines*, 318 U. S. 660, supra, p. 33, Mr. Justice Black said:

"The United States Marine Hospital in Honolulu had all the facilities which the ship lacked. These hospitals are recognized government institutions and a seaman has no burden to prove that the equipment and treatment in the hospital would have been better than the equipment and tratment on the ship" (p. 673).

V.

The judgment appealed from should be affirmed.

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FRANK I. FALLON
On the Brief

Dated: New York, N. Y.
November 18, 1960

APPENDIX

Alabama—1940 Code, Title 20, §3.
Alaska—Session Laws 1955, Ch. 96.
Arizona—Revised Stats. 1956, §44-101.
Arkansas—Statutes, 1947, Ch. 38, §§101, 104.

Calif.—Civil Code 1624.
Colorado—Revised Stats., Ch. 59, §1-12 et seq.
Conn.—General Stats. Rev. 1958, 52-550.

Delaware—Code, Title 6, §2714.
Dist. of Col.—Code §12-302.

Florida—Statutes 1959, §725.01.

Georgia—Code §20-401.

Hawaii—Revised Laws 1955, Ch. 190.

Idaho—Code 1946, Title Ch. 9, §505.
Illinois—Revised Stats. 1959, Ch. 59, §1.
Indiana—Burns Indiana Stats. Annotated of 1933, §33-101.
Iowa—Code 1958, Ch. 554, §4; Ch. 622, §32-35.

Kansas—General Stats. (1949), Ch. 33, §106.
Kentucky—Revised Stats. Official Edition, Ch. 371, §010.
Louisiana—No Stat. F as such but analogous provision: Rev. Civil Code, Art. 2278.

Maine—Revised Stats. 1954, Ch. 119.
Maryland—Michie's Code 1957, Ed. Art. 35, §36.
Mass.—General Laws, Tercentinary Edition 1932, Ch. 259, §1.
Michigan—Compiled Laws 1948, §§440.4; 566.106, 132.
Minnesota—Stats. 1957, Ch. 513, §01.
Mississippi—Code of 1942, Ch. 264.
Missouri—Revised Stats. 1949, §432.010.
Montana—Revised Code 1947, §13-606.

Nebraska—Revised Stats. 1943, §36-202.
Nevada—Revised Stats., §111.220.
New Hampshire—Revised Stats. Annotated 1955, Ch. 506, §§1-2.
New Jersey—Revised Stats., Title 25, Ch. 1, §5.
New Mexico—Adopted as part of common law. 4 N. M. 168; 16 Pac. 275.
New York—Pers. Prop. Law, §31.
North Carolina—General Stats. 1943, Ch. 22, §1.
North Dakota—Revised Code 1943, Ch. 9, §0604.
Ohio—Baldwin's Revised Code Annotated, 1953 Edition, §1335.05.
Oklahoma—Stats. 1951, Title 15, §136.
Oregon—Revised Stats. 1953, §§93.020, 41.580.
Pennsylvania—Purdon's Pennsylvania Stats. Annotated, Title 33, §§3, 4.
Rhode Island—General Laws 1956, Ch. 9.1.4.
South Carolina—Code of Laws of S. C. 1952, Title 11, §101.
South Dakota—Adopted as part of common law, 224 N. W. 949; 55 S. D. 68.
Tennessee—Official Tenn. Code Annotated (1956), §23-201.
Texas—Vernon's Texas Stats. 1948, Art. 3995.
Utah—Utah Code Annotated 1953, Title 25, Ch. 5.
Vermont—Vermont Stats. Annotated (1959), Title 12, §182.
Virginia—Code of Va., §11-2.
Virgin Islands—Code Annotated (1957), Title 28, §§241-246.
Washington—Revised Code, §§19.36, 0.10.
West Virginia—Michie's West Virginia Code, Ch. 36, Art. 1, §3; Ch. 55, Art. 1, §1.
Wisconsin—Stats. (1957), Ch. 241, §02.
Wyoming—Compiled Stats. (1945), Ch. 5, §101.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 96

JOHN M. KOSSICK,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondent presents its petition for a rehearing of the above entitled cause and respectfully shows:

This Court's decision is based upon a misunderstanding, viz.: that petitioner was "unable himself to defray the cost of private treatment" and was thus constrained to accept respondent's alleged promise to "assume responsibility for all consequences of improper or inadequate treatment" (pp. 1-2). Both petitioner's complaint and his answers to interrogatories make clear that this was not so. Paragraph Tenth of the complaint alleges:

> "That sometime before August 28, 1950, the plaintiff, informed the defendant that he had made arrangements with his attending Dr. Frick, aforementioned, for all the necessary treatment and postoperative care for the price of $350.00, which he, the plaintiff, was willing to pay" (R. 4).

In his answers to interrogatories petitioner swore:

> "Plaintiff repeatedly stated [to defendant] that he was willing to pay for his own medical treatment • • • he was willing to waive the cost of the said medical treatment" (R. 17).

> "• • • plaintiff was well aware that the usual duties of a steamship owner or operator were satisfied upon the furnishing of a captain's certificate to a United States Public Health Service Hospital but plaintiff became convinced that the defendants were making a separate contract • • •. Plaintiff was fully aware that he had a right to maintenance, even though he chose his own doctor and hospital for treatment and was aware that he would be waiving the cost of the cure and medical treatment. This he was willing to waive • • •" (R. 18).

The Court's mistaken belief that petitioner was unable to defray the cost of medical treatment led directly to its conclusion that the alleged agreement was maritime in nature. The Court concluded that it was maritime because it was given in substitution for petitioner's "cure" at Dr. Frick's hands, "cure" being a maritime thing. The Court said:

> "• • • that the contract here alleged should be regarded as an agreement on the part of petitioner to forego a course of treatment which might have involved respondent in some additional expense, in return for respondent's promise to make petitioner whole for any consequences of what appeared to it at the time as the cheaper alternative" (p. 7).

And the Court referred to:

> "* * * petitioner's good faith forbearance to press what he considered—perhaps erroneously—to be the full extent of his maritime right to maintenance and cure" (p. 7).

This led the Court to confuse the alleged agreement to pay damages for any improper treatment with the duty to provide "cure". The Court said:

> "It can as well be argued that the alleged contract related to and stood in the place of a duty created by and known only in admiralty as a kind of fringe benefit to the maritime contract of hire" (p. 6).

The "fringe benefit" referred to is, of course, "cure". But the alleged agreement to pay damages for malpractice was not a *substitute* for cure. There was no question of substituting anything for "cure"; the only question was whether "cure" would be by Dr. Frick or the Public Health Service Hospital. In his answers to interrogatories, petitioner admitted that he "was offered a master's certificate" (R. 16) but said that he "became convinced that the defendants were making a *separate contract* to be responsible for anything that went astray as a result of plaintiff's treatment at the said hospital" (R. 18, italics ours). Indeed, so separate was respondent's alleged agreement to pay damages that the complaint contained the additional and customary cause of action for maintenance and cure—subsequently discontinued because "cure" had been provided and because maintenance had been paid in full.

Moreover, it was inconsistent for the Court to say that "the alleged contract" to pay for malpractice took the place of the "fringe benefit" of "cure" and yet hold that the shipowner is not liable (on the facts of this case) for malpractice

during "cure" (pp. 2-3, 6). Since respondent's alleged promise was not (and petitioner admittedly knew it was not) in substitution for "cure", the whole basis of the Court's decision that the promise was maritime is plainly non-existent. There is, therefore, no fair comparison with *National Episcopal Hospital* v. *Pacific Transport Co.*, 3 F. 2d 508, D. C. Cal., 1920. On the contrary, the cases apply which hold that a contract to pay damages for the breach of a maritime contract is not maritime, e.g., *Pacific Surety Co.* v. *Leatham*, 151 Fed. 440, 7 Cir., *Clinton* v. *Int'l Org. of Masters*, 254 F. 2d 370, 9 Cir., *Goumas* v. *K. Karras & Son*, 140 F. 2d 157, 2 Cir., *Mulvaney* v. *Dalzell Towing Co.*, 90 F. Supp. 259, *Black Sea State S.S. Line* v. *Association of Int. Tr. Dist.*, 95 F. Supp. 180.

Pacific Surety Co. v. *Leatham*, *supra*, cannot be distinguished. The promise there, as here, was to answer for another's default in performing a maritime contract—but it was held not maritime. Respondent's duty under its alleged promise to respond in damages for malpractice, and respondent's duty to provide "cure," should not be, but have been confused. Since the promise sued on was wholly separate and apart from the duty to provide "cure," and was not a necessary adjunct of "cure," and certainly was not a substitute for "cure," it was not maritime.

Since respondent's promise was made on land, and was only to pay money, on land, for possible malpractice occurring on land, and was not a substitute for anything maritime, no question of accommodation of Federal and State interests arises. Nor is there any need to consider the subjective question of how much of a "salty flavor" (p. 11) this alleged agreement has.

Certainly, once the facts as claimed by petitioner are understood, there is no valid reason for resuscitating the moribund doctrine of *Southern Pacific Co.* v. *Jensen*, 244

U. S. 205. *Cf.* Mr. Justice Black's words, for a unanimous Court, in *Standard Dredging Corporation* v. *Murphy*, 319 U. S. 306:

> "• • • the Jensen case • • • has no vitality beyond that which may continue as to state workmen's compensation laws" (p. 309).

What the Court has done is to completely upset firmly fixed tenets for determining the area of admiralty jurisdiction and, unnecessarily we submit, substitute the subjective test of "salty flavor", thereby creating such uncertainty as to generate litigation for lawyers yet unborn. The effect of this decision is to open the flood gates of litigation to claims based on fraudulently concocted oral promises. It cannot seriously be contended that uniformity of the maritime law is well served when statutes of limitations may be dodged and shipping companies forced to trial on stale claims which, by their very nature, are rife with fraudulent possibility. Litigants should be protected against claims which are unprecedented in the maritime field and uniformly barred elsewhere.

For the foregoing reasons, respondent respectfully urges that this petition for a rehearing be granted, and that upon further consideration the judgment of the Court below be affirmed.

Dated: New York, May 10, 1961.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF COUNSEL

I, EUGENE UNDERWOOD, counsel for the above named respondent, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

EUGENE UNDERWOOD
Counsel for Respondent

SUPREME COURT OF THE UNITED STATES

No. 96.—October Term, 1960.

John M. Kossick, Petitioner, v. United Fruit Co.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April 17, 1961.]

Mr. Justice Harlan delivered the opinion of the Court.

This case calls in question the propriety of a dismissal before trial of the first cause of action in a seaman's diversity complaint. Dismissal was on the ground that the allegations of the complaint are deficient by reason of the New York statute of frauds.

The allegations of the complaint, which for present purposes must be taken as true, are in substance as follows: Petitioner, while employed as chief steward on one of the vessels of respondent, United Fruit Company, suffered a thyroid ailment, not attributable to any fault of the respondent, but with respect to which it concededly had a legal duty to provide him with maintenance and cure. (*The Osceola*, 189 U. S. 158.) Respondent insisted that petitioner undergo treatment at a United States Public Health Service Hospital. Petitioner, however, considering on the basis of past experience that such treatment would prove unsatisfactory and inadequate, notified respondent that he wished to be treated by a private physician who had agreed to take care of him for $350, which amount petitioner insisted would be payable by the respondent in fulfillment of its obligation for maintenance and cure.

Respondent, the complaint continues, declined to accede to this course, but agreed that if petitioner would enter a Public Health Service Hospital (where he would receive free care) it would assume responsibility for all

consequences of improper or inadequate treatment. Relying on that undertaking, and being unable himself to defray the cost of private treatment, petitioner underwent treatment at a Public Health Service Hospital. The Public Health Service Hospital and private physician alluded to were both located in New York.

Finally, it is alleged that by reason of the improper treatment received at such hospital, petitioner suffered grievous unwonted bodily injury, for which the respondent, because of its undertaking, is liable to the petitioner for damages in the amount of $250,000.[1]

The District Court dismissed the complaint, considering that the agreement sued on was void under the New York Statute of Frauds, N. Y. Personal Property Law § 31 (2),[2] there being no allegation that such agreement was evidenced by any writing, 166 F. Supp. 571.[3] The Court of Appeals affirmed. 275 F. 2d 500. We brought the case here because it presented novel questions as to the interplay of state and maritime law. 363 U. S. 838.

At the outset, we think it clear that the lower courts were correct in regarding the sufficiency of this complaint as depending entirely upon its averments respecting respondent's alleged agreement with petitioner. Liability

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[1] Apparently any cause of action against the United States arising out of the alleged negligence of its agents in treating petitioner was barred by the running of a shorter statute of limitations than is applicable to the contract alleged here. Compare 28 U. S. C. § 2401 (b) with New York Civil Pratice Act § 48.

[2] New York Personal Property Law §31 (2) provides:

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the person to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

"2. Is a special promise to answer for the debt, default or miscarriage of another."

[3] A second cause of action for maintenance and cure was subsequently discontinued by petitioner, 275 F. 2d, at 502.

here certainly cannot be founded on principles of *respondeat superior.*[*] Nor is there anything in the authorities relating to a shipowner's duty to provide maintenance and cure which suggests that respondent was obliged, as a matter of law, to honor petitioner's preference for private treatment, or that it was responsible for the quality of petitioner's treatment at other hands which, for all that appears, may reasonably have been assumed to be well trained and careful.

With respect to respondent's alleged agreed undertaking, as the case comes to us, petitioner, on the one hand, does not deny the contract's invalidity under the New York Statute of Frauds, if state law controls, nor, on the other hand, can its validity well be doubted, though the alleged agreement was not reduced to writing, if maritime law controls. For it is an established rule of ancient respectability that oral contracts are generally regarded as valid by maritime law.[†] In this posture of things two

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[*] Although the question has not often been litigated, *Union Fish Co.* v. *Erickson*, 248 U. S. 308; *see United States Fidelity & Guaranty Co.* v. *American-Hawaiian S. S. Co.*, 280 F. 1023; *Hastorf* v. *Long-W. G. Broadhurst Co.*, 239 F. 852; *Quirk* v. *Chuban*, Fed. Cas. No. 11,518; *Northern Star S. S. Co.* v. *Kansas Milling Co.*, 75 F. Supp. 534, it is well accepted that maritime contracts do not as a generality depend on writing for their validity. As Judge Hough, one of the most distinguished of the federal admiralty judges once said:

". . . [This] failure to stress force of custom, in maritime matters, is found in Union Fish Co. v. Erickson [*supra*] where with obvious correctness the California statute of frauds was not permitted to defeat a shipmaster's libel for wrongful discharge from an engagement for more than one year. . . . [T]he ground of decision should have been the simple one that such engagements, orally made, were as old as the history of marine customs, had passed into the maritime law of the United States, and would be recognized and enforced by the courts of the nation,—so that what California said on the subject (if anything) was merely immaterial." Hough, Of Late Years, 37 Harv. L. Rev. 529, at 537.

Writing of a different sort of contract, an equally distinguished British admiralty judge has said that ". . . it is common practice for

questions must be decided; *First*, was this alleged contract a maritime one? *Second*, if so, was it nevertheless, of such a "local" nature that its validity should be judged by state law?

I.

The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw. Precedent and usage are helpful insofar as they exclude or include certain common types of contract: a contract to repair, *Endner* v. *Greco*, 3 F. 411, or to insure a ship, *Insurance Co.* v. *Dunham*, 11 Wall. 1, is maritime, but a contract to build a ship is not. *People's Ferry Co.* v. *Beers*, 20 How. 393. Without doubt a contract for hire either

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commercial men to assume very extensive financial obligations on the nod of a head or the initialing of a slip, and many binding chartering engagements are no doubt daily concluded in an informal manner. . . ." *Soc. Portuguesa de Navios Tanques, Ltd.* v. *Hvalfsk Poldris A/S.* [1952] 1 Lloyd's List Reports 73, 74 (per McNair, J.), in which opinion he is confirmed by Kent, 3 Commentaries 159–160 (1828 ed.), and the French authority, Pothier, Maritime Contracts 10 (Cushing trans.). True, a seaman's contract of hire, his articles, have long been required to be in writing by statutes of the various maritime nations, among them one of the first statutes passed by our Congress, 1 Stat. 131 (1791). Compare 2 Geo. II c. 36 (1729). But this rule was clearly instituted for the protection of the seaman, Curtis, Merchant Seamen 37, and in no way assumes the invalidity of such contracts in the absence of writing. In our law the seaman who ships without articles can recover the highest wages paid at the port of embarcation, as well as subjecting the master who took him on board to penalties, 46 U. S. C. §§ 564, 578; Norris, The Law of Seamen, §§ 91, 119. An *Ordonnance* of Louis XIV declares that if the seaman's contract is not in writing, the seaman's oath as to its provisions must be credited, Pothier, *supra*, at 100, while Lord Tenterden, Merchant Ships and Seamen, 476, expressly states that an oral contract of hire is not invalid but only results in a penalty against the master. The *Union Fish* case, *supra*, no more than exemplifies the enforceability of an oral maritime contract of hire.

of a ship or of the sailors and officers to man her is within the admiralty jurisdiction. 1 Benedict, Admiralty, 366. A suit on a bond covering cargo on general average is governed by admiralty law, *Cie Francaise de Navigation* v. *Bonasse*, 19 F. 2d 777, while an agreement to pay damages for another's breach of a maritime charter is not. *Pacific Surety Co.* v. *Leatham*, 151 F. 440. The closest analogy we have found to the case at hand is a contract for hospital services rendered an injured seaman in satisfaction of a shipowner's liability for maintenance and cure, which has been held to be a maritime contract. *National Episcopal Hospital* v. *Pacific Transport Co.*, 3 F. 2d 508. The principle by reference to which the cases are supposed to fall on one side of the line or the other is an exceedingly broad one. "The only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce . . . ." 1 Benedict, Admiralty, 131.[5]

The Court of Appeals here held:

> "The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of treatment. . . . For all that appears in the complaint, it may well be that the contract sued on was allegedly made after the maritime contract of employment of the plaintiff had been terminated. It really makes no difference whether this was so or not. All that remained was the performance by the shipowner of his undisputed obligation to supply maintenance

[5] Benedict goes on to quote from an anonymous commentary on the Mediaeval Statutes of Culm, one of the early sources of maritime law, that anything pertaining to navigation or seaman is to be considered a part of the maritime law.

> and cure. The shipowner supplied plaintiff with a master's certificate, which was used by him to obtain admittance as a patient in the United States Public Health Service Hospital. . . . That took care of the obligation to furnish 'cure.' . . ."

With respect to the learned judges below, we think that is too narrow a view of the matter. It can as well be argued that the alleged contract related to and stood in place of a duty created by and known only in admiralty as a kind of fringe benefit to the maritime contract of hire. See *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367. The Court of Appeals and respondent are certainly correct in considering that a shipowner's duty to provide maintenance and cure may ordinarily be discharged by the issuing of a master's certificate carrying admittance to a public hospital, and that a seaman who refuses such a certificate or the free treatment to which it entitles him without just cause, cannot further hold the shipowner to his duty to provide maintenance and cure. *Williams* v. *United States*, 133 F. Supp. 319; *Luth* v. *Palmer Shipping Co.*, 10 F. 2d 274; *The Bouker No. 2*, 241 F. 831; see *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525. But without countenancing petitioner's intemperate aspersions against Public Health Service Hospitals, and rejecting as we have the noncontractual grounds upon which he seeks to predicate liability here, we nevertheless are clear that the duty to afford maintenance and cure is not simply and as a matter of law an obligation to provide for entrance to a public hospital. The cases which respondent cites hold no more than that a seaman who can receive adequate and proper care free of charge at a public hospital may not "deliberately refuse the hospital privilege, and then assert a lien upon his vessel for the increased expense which his whim or taste has

created." *The Bouker No. 2, supra*, at 835. Presumably if a seaman refuses to enter a public hospital or, having entered, if he leaves to undergo treatment elsewhere, he may recover the cost of such other treatment upon proof that "proper and adequate" cure was not available at such hospital. Cf. *Williams* v. *United States*, *Luth* v. *Palmer Shipping Co.*, *supra*.

No matter how skeptical one may be that such a burden of proof could be sustained, or that an indigent seaman would be likely to risk losing his rights to free treatment on the chance of sustaining that burden, since we should not exclude that possibility as a matter of law as the Court of Appeals apparently did, it must follow that the contract here alleged should be regarded as an agreement on the part of petitioner to forego a course of treatment which might have involved respondent in some additional expense, in return for respondent's promise to make petitioner whole for any consequences of what appeared to it at the time as the cheaper alternative. In other words, the consideration for respondent's alleged promise was petitioner's good faith forbearance to press what he considered—perhaps erroneously—to be the full extent of his maritime right to maintenance and cure. Compare American Law Institute, Restatement, Contracts §§ 75, 76. So viewed, we think that the alleged agreement was sufficiently related to peculiarly maritime concerns as not to put it, without more, beyond the pale of admiralty law.

This brings us, then, to the remaining, and what we believe is, the controlling question: whether the alleged contract, though maritime, is "maritime and local," *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242, in the sense that the application of state law would not disturb the uniformity of maritime law, *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205.

II

Although the doctrines of the uniformity and supremacy of the maritime law have been vigorously criticized—see *Southern Pacific Co.* v. *Jensen*, *supra*, at 218 (dissenting opinion); *Standard Dredging Co.* v. *Murphy*, 319 U. S. 306, 309—the qualifications and exceptions which this Court has built up to that imperative doctrine have not been considered notably more adequate. See Gilmore and Black, Admiralty, *passim*; Currie, Federalism and Admiralty, The Devil's Own Mess, 1960, The Supreme Court Review, 158; The Application of State Survival Statutes in Maritime Causes, 60 Col. L. Rev. 534. Perhaps the most often heard criticism of the supremacy doctrine is this: the fact that maritime law is—in a special sense at least, *Romero* v. *International Terminal Co.*, 358 U. S. 354—federal law and therefore supreme by virtue of Article VI of the Constitution, carries with it the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant. But the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern. Surely the claim of federal supremacy is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight.

Thus, for instance, it blinks reality to assert that because a longshoreman, living ashore and employed ashore by shoreside employers, performs seaman's work, the State with these contacts must lose all concern for the

longshoreman's status and wellbeing. In allowing state wrongful death statutes, *The Tungus* v. *Skovgaard*, 358 U. S. 500; *The Hamilton*, 207 U. S. 398, and state survival of actions statutes, *Just* v. *Chambers*, 312 U. S. 383, respectively to grant and to preserve a cause of action based ultimately on a wrong committed within the admiralty jurisdiction and defined by admiralty law, this Court has attempted an accommodation between a liability dependent primarily upon the breach of a maritime duty and state rules governing the extent of recovery for such breach. Since the chance of death foreclosing recovery is necessarily a fortuitous matter, and since the recovery afforded the disabled victim of an accident need be no less than that afforded to his family should he die, the intrusion of these state remedial systems need not bring with it any undesirable disuniformity in the scheme of maritime law.

Altogether analogous reasoning was used by Mr. Justice Brandeis in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, where it was held that a New York court could properly compel arbitration under the arbitration clause of a maritime contract. It was there reasoned that since such clauses are valid in admiralty and their breach gives rise to an action for damages, to compel arbitration is really to do no more than substitute a different and more effective remedy for that available in admiralty.

The line of cases descended from the early precedent of *Cooley* v. *Board of Wardens*, 12 How. 299, and most recently added to by *Huron Portland Cement* v. *Detroit*, 362 U. S. 440; see also *Kelly* v. *Washington*, 302 U. S. 1, exemplify but another variation of this process of accommodation. In the *Huron* case we allowed the City of Detroit to impose the requirements of its smoke control regulations on vessels coming to the city, even though

they had measured up to federally imposed standards as to ship's boilers and equipment. There the matter was put thus:

> ". . . The thrust of the federal inspection laws [with which petitioner had complied] is clearly limited to affording protection from the perils of maritime navigation. . . .
>
> By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community. . . .
>
> "Congressional recognition that the problem of air pollution is peculiarly a matter of state and local concern is manifest in . . . legislation." 362 U. S., at 445–446.

Turning to the present case, we think that several considerations point to an accommodation favoring the application of maritime law. It must be remembered that we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability or public regulations, obligations imposed simply by virtue of the authority of the state or federal government. This fact in itself creates some presumption in favor of applying that law tending toward the validation of the alleged contract. *Pritchard* v. *Norton*, 106 U. S. 124; Ehrenzeneig, Contracts in the Conflict of Laws I, 59 Col. L. Rev. 973. As we have already said, it is difficult to deny the essentially maritime character of this contract without either indulging in fine-spun distinctions in terms of what the transaction was *really* about, or simply denying the alleged agreement that characterization by reason of its novelty. Considering that sailors of any nationality may join a ship in any port, and that it is the clear duty of the ship to put into the first available port if this be necessary

provide prompt and adequate maintenance and cure to a seaman who falls ill during the voyage, *The Iroquois*, 194 U. S. 240, it seems to us that this is such a contract as may well have been made anywhere in the world, and that the validity of it should be judged by one law wherever it was made. On the other hand we are hard put to it to perceive how this contract was "peculiarly a matter of state and local concern," *Huron Portland Cement* v. *Detroit, supra*, unless it be New York's interest in not lending her courts to the accomplishment of fraud, something which appears to us insufficient to overcome the countervailing considerations. Finally, since the effect of the application of New York law here would be to invalidate the contract, this case can hardly be analogized to cases such as *Red Cross Line* v. *Atlantic Fruit*, or *Just* v. *Chambers, supra*, where state law had the effect of supplementing the remedies available in admiralty for the vindication of maritime rights. Nor is *Wilburn Boat Co.* v. *Fireman's Ins. Co.*, 348 U. S. 311, apposite. The application of state law in that case was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented. A concurring opinion, *id.*, at 321, and some commentators have preferred to refer the decision to the absurdity of applying maritime law to a contract of insurance on a houseboat established in the waters of a small artificial lake between Texas and Oklahoma. See Gilmore and Black, Admiralty 44–45. Needless to say the situation presented here has a more genuinely salty flavor than that.

In sum, were contracts of the kind alleged in this complaint known to be a normal phenomenon in maritime affairs, we think that there would be little room for argument in favor of allowing local law to control their validity. A different conclusion should not be reached either because such a contract may be thought to be a rarity, or because of any suspicion that this complaint may have

been contrived to serve ulterior purposes. Cf. 275 F. 2d, at 504; 166 F. Supp., at 573–574, note 1, *supra*. Without remotely intimating any view upon the merits of petitioner's claim, we conclude that it was error to apply the New York statute of frauds to bar proof of the agreement alleged in the complaint.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 96.—October Term, 1960.

John M. Kossick, Petitioner, v. United Fruit Co.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April 17, 1961.]

Mr. Justice Frankfurter, whom Mr. Justice Stewart joins, dissenting.

Certainly no decision in the Court's history has been the progenitor of more lasting dissatisfaction and disharmony within a particular area of the law than *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. The mischief it has caused was due to the uncritical application of the loose doctrine of observing "the very uniformity in respect to maritime matters which the Constitution was designed to establish." *Southern Pacific Co.* v. *Jensen*, *supra*, at 217. The looser a legal doctrine, like that of the duty to observe "the uniformity of maritime law," the more incumbent it is upon the judiciary to apply it with well-defined concreteness. It can fairly be said that the *Jensen* decision has not been treated as a favored doctrine. Quite the contrary. It has been steadily narrowed in application, as is strikingly illustrated by such a *tour de force* as our decision in *Davis* v. *Department of Labor*, 317 U. S. 249.

The Court today, relying as it does on *Jensen*, reinvigorates that "ill-starred decision." *Davis* v. *Department of Labor*, *supra*, at 259 (concurring opinion). The notion that if such a limited and essentially local transaction as the contract here in issue were allowed to be governed by a local statute of frauds it would "disturb the uniformity of maritime law" is, I respectfully submit, too abstract and doctrinaire a view of the true demands of maritime law. I would affirm the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 96.—October Term, 1960.

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[April 17, 1961.]

Mr. Justice Whittaker, dissenting.

Like the Court of Appeals, 275 F. 2d 500, I think the oral contract here claimed by petitioner was not a maritime but a New York contract and barred by its statute of frauds. New York Personal Property Law, § 31(2). I therefore dissent.